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No. 95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RAYMOND REECE,

Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Are an employee's claims of racial discrimination under state statutes and common law completely preempted by section 301 of the Labor Management Relations Act, and thereby automatically subject to removal to federal court, whenever the employer asserts that its conduct was permitted by an applicable collective bargaining agreement?

All parties to the proceeding below are listed in the caption.

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v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Raymond Reece petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 79 F.3d 485, and appears in the Appendix to this Petition at 1a-5a (App. 1a-5a). The district court's memoranda and orders denying petitioner's motion to remand this case to the state court from which it had been removed, and then denying a motion for reconsideration of that order, are printed at App. 6a and 7a-10a. The district court's order granting summary judgment to respondent appears at App. 12a-18a. The district court's memoranda and orders are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. App. 1a-5a. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

Section 21.051 of the Texas Labor Code provides as follows, in pertinent part:

> [A]n employer commits an unlawful employment practice if because of race . . . the employer (1) discriminates in any other manner against an individual in connection with compensation or the terms, conditions or privileges of employment or (2) limits . . . an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity.

STATEMENT

A. Facts.

Petitioner Raymond Reece, who is black, has been an electrician for respondent Houston Lighting and Power Company since 1974; he currently holds the position of head

cable splicer. Several times he sought promotions to the position of crew leader and access to company classes that other head cable splicers were taking in order to enhance their skills and improve their chances for promotion. He was denied such opportunities, and noticed that respondent consistently gave them to white employees with less seniority than he. For example, during 1994 and 1995, 19 white employees in respondent's underground cable department received fiber optic training; no black employees received such training. At the same time, eighteen white employees, but no black employees, took classes on troubleshooting. And eight white, and no black, employees hold positions as crew leaders.

Respondent's production and maintenance employees are represented in collective bargaining by Local 66 of the International Brotherhood of Electrical Workers, and work under a collective bargaining agreement ("CBA") between Local 66 and respondent. Under the CBA, promotions for most employees are governed by seniority, so long as ability, skill and qualifications are equal. However, selection, promotion and assignment of head journeymen (of which head cable splicers such as petitioner are one kind), are within respondent's "sole discretion"; the CBA allows respondent to consider not only ability, skill, qualifications, performance, seniority, attendance and conduct, but any other matter. Similarly, the CBA reserves to respondent sole discretion to promote to positions not covered by the CBA, such as crew leaders.

B. Proceedings Below.

On April 18, 1994, petitioner filed charges with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights ("TCHR"), alleging that he had been denied both promotions and training opportunities because of his race and because he had previously filed a lawsuit against respondent charging race discrimination. While the agencies investigated these allegations, respondent continued to deny petitioner's request to attend classes held later that same year. Accordingly, after the TCHR issued a right to sue letter, petitioner filed suit on March 9, 1995, in the 215th Judicial District Court of Harris County, Texas, alleging that respondent had both discriminated against him on the basis of race, and retaliated against him for having filed his 1994 discrimination charge. Petitioner alleged both that this conduct violated the Texas Labor Code, §§ 21.001 *et seq.*, and that it was extreme and outrageous in violation of state common law. Petitioner deliberately confined his allegations to violations of state law, and pleaded no claim under Title VII of the Civil Rights Act, under the CBA or section 301 of the Labor Management Relations Act ("LMRA"), or under any other federal law.

Nevertheless, on April 6, 1995, respondent removed the case to the United States District Court for the Southern District of Texas, Houston Division. Respondent pointed out that the CBA spoke to the issue of promotions, and authorized it to take seniority and a variety of other matters into consideration. Thus, according to respondent, it would ultimately be necessary to consult the CBA in order to decide whether respondent had discriminated or retaliated against petitioner, and this need to consult the CBA, in turn, preempted petitioner's claim and replaced his state law claim

with a federal claim under section 301 of the LMRA, over which the federal courts had subject matter jurisdiction.

Petitioner moved to remand the case to state court, pointing out that defenses based on federal law do not ordinarily provide a basis for removal. Petitioner argued that, although the "complete preemption" doctrine makes section 301 preemption a partial exception to this general rule, under this Court's decision in *Lingle v. Norge*, 486 U.S. 399 (1988), a state law claim alleging retaliatory discharge is not ordinarily preempted by the LMRA because such claims typically do not require interpretation of a CBA; rather, the question in such cases is a factual one: was the employer's discharge decision motivated by forbidden animus, in which case the claim succeeds, or by some other reason, in which case it fails. Nevertheless, by a one-paragraph order, the district court ruled that petitioner's claims "require interpretation of the [CBA] and are therefore preempted by section 301 . . .." App. 6a.

Petitioner moved for reconsideration, arguing that there was no need to examine the CBA in order to determine whether his race and retaliation claims were valid. He acknowledged that, in a recent decision, *Medrano v. Excel Corp.*, 985 F.2d 230 (1993), the Fifth Circuit had held that a state law retaliatory discharge claim was preempted because it was predicated on an allegation that a provision in the CBA unlawfully authorized retaliation for filing a workers compensation claim. That case was distinguishable, he contended, because the CBA here did not purport to authorize racial discrimination in promotions. Moreover, he noted that courts in several other circuits had expressly held that state law claims of race or national origin discrimination are not preempted by the LMRA. Furthermore, he argued,

even if the court might have to **look** at the CBA in the course of deciding his case, that was not the same as having to interpret the CBA, not to speak of making the CBA so central to his claim as to cause it to be preempted.

The district court denied reconsideration of its finding of complete preemption. It stated that the CBA "governs" respondent's "exclusive, discretionary right to select, promote, demote, transfer or assign head cable splicers after consideration" of various factors, and that, consequently, even though the intentional infliction claim was based solely on racial discrimination, the element of extreme and outrageous conduct "implicates the[se] provisions of the CBA." *Id.* 9a. Accordingly, the Court stated, it would be necessary to interpret the CBA in order to decide petitioner's claim, and the claim was, therefore, preempted. Respondent then moved for summary judgment, and the district court, having already determined that the section 301 claim preempted the state law claim, dismissed petitioner's complaint as thus recharacterized because petitioner had not exhausted the grievance procedure under the CBA before filing his suit.

The court of appeals affirmed in a brief decision. It noted that, under Texas law, to establish his statutory discrimination claims petitioner would follow a burden-shifting scheme under which he could make out a prima facie case by showing his protected status, adverse treatment, and dissimilar treatment of non-protected employees; respondent would then articulate a legitimate non-discriminatory reason for its actions; and petitioner would then have the burden of showing that the articulated reason was pretext. App. 2a-3a. However, the court observed, Reece's claim of discrimination "turns on questions of promotion, seniority

and assignment to training programs, all of which are provided for in the CBA." *Id.* 3a. Because respondent would rely on the CBA to defend its conduct, the CBA would, the court assumed, inevitably have to be interpreted, and so this was a case where complete preemption resulted from the fact that "the interpretation of the CBA is made necessary by an employer defense." *Id.* (internal quotation marks and citation omitted).

Similarly, the court below concluded, petitioner's tortious discrimination claim required a showing of "extreme and outrageous conduct." The court opined, without any explanation, "[i]n order to evaluate whether [respondent]'s conduct was 'outrageous,' the conduct must be measured against the CBA." *Id.* The court below acknowledged that its decision conflicted with a line of cases in at least one other circuit. Thus, the Ninth Circuit had held in *Ramirez v. Fox Television Station*, 998 F.2d 743, 748 (1993), that no claims under California's employment discrimination statute were preempted. Nonetheless, the Fifth Circuit adhered to its position on the ground that it was "mandated" by *Lingle*. *Id.* 4a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS, AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ABOUT WHETHER EMPLOYMENT DISCRIMINATION COMPLAINTS UNDER STATE LAW ARE AUTOMATICALLY PREEMPTED, AND HENCE REMOVABLE, WHEN THE EMPLOYER DEFENDS ON THE GROUND THAT IT COMPLIED WITH A COLLECTIVE BARGAINING AGREEMENT.

Review should be granted in this case for three reasons. First, the Fifth Circuit's analysis of section 301's preemptive scope is inconsistent with numerous decisions of this Court holding that independent state law claims are not preempted. Second, the decision below is squarely contrary to the holdings of several other lower courts, and indeed the lower courts continue to struggle to determine the extent to which they may consult a CBA in the course of adjudicating an employer's defenses without thereby preempting the employee's independent state law claim. Third, removal to federal court, on the ground that respondent's defenses to petitioner's state law claims would require consideration of the CBA and thus require preemption of petitioner's claims, is similarly contrary to decisions of this Court and of numerous other federal courts. In order to understand how far the lower court has strayed, it is necessary first to review this Court's rulings in the area.

1. This Court has held that all claims that seek to enforce a collective bargaining agreement arise under section 301 of the LMRA, even if the plaintiff purports to bring the claim under state law. *Avco Corp. v. Machinists*, 390 U.S.

557 (1968); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court ruled that an employee cannot avoid the preemptive effect of section 301 simply by using a tort label to describe a claim that, in effect, seeks to enforce duties created by a CBA.

But *Allis-Chalmers* also insisted that the mere fact that an employer has entered into a CBA governing its employees' terms and conditions of employment does not immunize the employer from claims seeking to enforce state law rights that are independent of any right established by contract. 471 U.S. at 212. Section 301 did not "give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Id.* Nor must the state claim be completely unrelated to the CBA; it must only be "sufficiently independent of the [CBA] to withstand the pre-emptive force of § 301." *IBEW v. Hechler*, 481 U.S. 851, 859 (1987).

Lingle v. Norge, 486 U.S. 399 (1988), made clear the limits of the preemption doctrine enunciated in *Allis-Chalmers*, by holding that an employee's state law claim of retaliatory discharge is not preempted by the LMRA. *Accord Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994) (no preemption under Railway Labor Act ("RLA")). Some lower courts had understood *Allis-Chalmers* to stand for the proposition that any state law claim brought by a unionized employee was necessarily dependent on the CBA if there existed parallel rights in the CBA and a grievance procedure for enforcing them. In *Lingle*, the employee claimed that she

had been fired for exercising her right to file a workers compensation claim, and the Court held that the mere existence of a CBA with an arbitration clause was not sufficient to preclude the states from providing an independent cause of action to employees who were terminated for a reason deemed by the state to be contrary to public policy. The Court held that state law tort claims are preempted only to the extent that they are dependent on the meaning of a CBA, and the fact that a CBA may contain a clause that provides rights parallel to the state claim does not make the state law claim "dependent" on the CBA. 486 U.S. at 408-410. When the employee claims that the discharge was based on the exercise of the right to file a workers compensation claim, the Court ruled, there is no need to inquire into the meaning of the CBA, because either the employer proceeded with the alleged bad motive, in which case the employee prevails, or it did not, in which case the employee loses. The Court went on to observe that it was possible for a state law claim to require some reference to a CBA without being preempted:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a CBA and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the state law analysis would not thereby be preempted.
>
> 486 U.S. at 413 n.12.

Similarly, in *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), an aircraft mechanic claimed that he had been fired for refusing to certify the safety of certain planes and for reporting his safety concerns to the Federal Aviation Administration; the airline claimed that he had properly been

discharged for violating a provision of the CBA requiring mechanics to sign work records in connection with the work they perform, and that his claims and its defenses could only be pursued in arbitration under the RLA. This Court held that the state law claims were not preempted, specifically rejecting the employer's contention, based on *Conrail v. RLEA*, 491 U.S. 299 (1989), that a state law claim is preempted when the employer's action is "arguably justified" by a provision in the CBA. *Id.* at 2250. As the Court explained in *Norris*, the fact that a defense of arguable justification under the CBA may serve to distinguish between major and minor disputes under the RLA does not mean that the same test determines "the threshold question whether the dispute was subject to the RLA in the first place." *Id.* at 2251. And it would not be necessary to determine whether the employer violated the CBA in order to resolve state law retaliation claims, because those claims "require only the purely factual inquiry into any retaliatory motive of the employer." *Id.*

The same issue arose in *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), where the employer contended that state law claims are necessarily preempted whenever an employer could identify some way in which a provision in the CBA could be relevant to the disposition of a state law claim. The Court acknowledged that there was substantial dispute among the lower courts about the application of the principles of *Lingle* and *Lueck*, and that there might be some cases where a genuine dispute could be implicated by state law claims even if the claims did not derive from the CBA. The Court found it unnecessary to decide whether it would be necessary to preempt such claims, on the one hand, or whether other means of accommodating the federal law interests could be

found short of complete preemption, *id.* at 2078 n.18, because in *Livadas* there was no dispute about the CBA's meaning. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.* at 2078.

Here, the employer did no more than point to a provision in the CBA that gave it broad discretion over the selection of persons to be promoted and over the allocation of training opportunities. There was no dispute about the meaning of these contract terms. And yet the court below allowed respondent's CBA-based defense to preempt petitioner's claim that the reason why he had been denied promotions and training was racial discrimination forbidden by state law. The conflict between the ruling of the Fifth Circuit and the consistently contrary decisions of the Court is the first reason why certiorari should be granted.

2. Second, as the court below readily acknowledged, its approach to preemption of discrimination claims squarely conflicts with other appellate decisions. Indeed, with respect to class-based discrimination claims, the Fifth Circuit stands virtually alone in its position that the mere need to examine a CBA causes the state law claim to be preempted. The Fifth Circuit so held in the case below, as it had previously done in *Medrano v. Excel Corp.*, 985 F.2d 230 (5th Cir. 1993).

Every other court to consider the question in the context of race or sex discrimination claims has found them to be indistinguishable from retaliation cases like *Lingle* and

Norris[1]. As the court below acknowledged, App. 4a, the Ninth Circuit takes a diametrically opposing position to the Fifth Circuit, refusing to preempt state law discrimination claims simply because the employer pointed to a CBA as a possible justification for its actions. *E.g., Ramirez v. Fox Television Station*, 998 F.2d 743, 749 (1993):

> The [CBA] may be crystal clear . . . but Fox nonetheless may have ignored the [CBA] or applied it to her in a discriminatory manner. Thus, reference to or consideration of the terms of a [CBA] is not the equivalent of interpreting the meaning of the terms. If it were, all discrimination actions brought by unionized employees would be preempted because the starting point for every case would have to be the agreement. Although the line between reference to and interpretation of an agreement may be somewhat hazy, merely referring to an agreement does not threaten the goal that prompted

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[1] Some First Circuit cases suggest that that court may be closer to the Fifth Circuit in its hospitality to section 301 preemption claims. One enigmatic decision held that a state claim of discharge to prevent an employee from obtaining commissions was preempted because the CBA regulated the rates of pay, including commissions, *Quesnel v. Prudential Ins. Co.*, 66 F.3d 8 (1st Cir. 1995), and another held that state law handicap discrimination claims are preempted by section 301. *O'Brien v. Conrail*, 972 F.2d 1 (1992). The majority rule remains that handicap claims are not preempted. *E.g., Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995); *Martin Marietta Corp. v. Maryland Comm. on Human Relations*, 38 F.3d 1392, 1398-1402 (4th Cir. 1994); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 (6th Cir. 1989); *Miller v. AT&T Network Systems*, 850 F.2d 543, 548-550 (9th Cir. 1988). *Compare Davis v. Johnson Controls*, 21 F.3d 866, 868 (1994) (preempted), *with Taggart v. TWA*, 40 F.3d 269, 274-275 (8th Cir. 1994) (not preempted).

> preemption — the desire for uniform interpretation of labor contract terms.

Accord Kohl's Food Stores v. Hyland, 32 F.3d 1075, 1079 (7th Cir. 1994) (CBA may be consulted along with other factors without interpreting its terms and thus preempting state claim). The Ninth Circuit has repeatedly denied employer attempts to use section 301 to preempt claims under a variety of state anti-discrimination laws.[2]

Numerous district courts in other circuits have reached the same conclusion.[3] The issue often arises, as it did here, in the context of a motion to remand a case that was removed on grounds of complete preemption. Because such rulings are nonappealable under 28 U.S.C. § 1447(c), they are the final word in those districts. Moreover, appellate courts in several states have refused to preempt state discrimination claims simply because the employer claimed that the CBA supported its position.[4] And several other courts of appeals,

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[2] *E.g.*, *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 240 (9th Cir. 1990) (religious discrimination claim not preempted); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 644 (9th Cir. 1989) (race discrimination claim not preempted).

[3] *E.g.*, *Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F. Supp. 1529, 1534-1535 (N.D.W.Va. 1995) (state-law claim of sex discrimination and sexual harassment not preempted); *Carrington v. RCA Global Communications*, 762 F. Supp. 632, 639-642 (D.N.J. 1991).

[4] *E.g.*, *Commodore v. University Mech. Contr.*, 120 Wash.2d 120, 132-133, 839 P.2d 314, 320 (1992). *See also Hatridge v. Day & Zimmerman*, 789 S.W.2d 654 (Tex. App. -- Texarkana 1990) (race discrimination claim not preempted; no mention of defense based on CBA).

although not being presented with race or sex discrimination claims, have stated that such claims would not be preempted, because they present the factual question of motivation, not the legal question of the meaning of the CBA.[5]

There is a good reason why most lower courts have refused to allow preemption in cases like this one: if the employer's CBA-based defenses are sufficient to preempt the discrimination claim here, they will **always** lead to preemption of both discrimination and retaliation cases, thus completely undercutting the anti-preemption holdings of *Lingle, Norris,* and *Livadas*, and contrary to the presumption giving the narrowest scope to any preemption of state law. *See Medtronic, Inc. v. Lohr*, No. 95-754, at 12-13 (June 26, 1996). This case thus presents the question whether an employer's mere invocation of the CBA as presenting a potential defense can serve to destroy a cause of action that a state has chosen to promulgate to protect its citizens.

In this case, petitioner claims that his employer withheld certain valuable job benefits from him because of his race, pointing to evidence that these benefits were routinely given to white employees and not to black employees similarly situated. The employer responded, as employers generally do, by contending that it had other, legitimate reasons for according the benefits to others but not petitioner. Whenever an employer has a CBA, the employer will, of course, contend — as respondent did here — that the CBA recognizes the legitimacy of the reasons it has given for

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[5] *O'Brien v. Conrail*, 972 F.2d 1, 5-6 (1st Cir. 1992); *McCall v. Chesapeake & Ohio Ry. Co.*, 844 F.2d 294, 302 (6th Cir. 1988); *Lingle v. Norge*, 823 F.2d 1031, 1046 n.17 (7th Cir. 1987), *rev'd on other grounds*, 486 U.S. 399 (1988).

its benefit distribution decisions. Under the decision below, the mere fact that the employer has **asserted** justifications based on the CBA is sufficient first to warrant removal to federal court, wresting the decisional power from the state's own courts, and then to extinguish the state's anti-discrimination policy, leaving the matter solely to the disposition of the union and the employer through the grievance procedure. Such a result is completely inconsistent with this Court's holdings in *Lingle* and its progeny. "It is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic, Inc. v. Lohr*, No. 95-754, at 15 (June 26, 1996) (plurality opinion).

The fact that petitioner has alleged his racial discrimination claim in the form of the tort of intentional infliction of emotional distress ("IIED") in addition to his claim under the Texas civil rights statute does not require the preemption of the tort claim. The lower courts are divided over the question whether IIED claims are preempted by section 301, with a single circuit often displaying a startling inconsistency of analysis. Not infrequently, a court will simply conclude that, because liability for IIED depends on a finding that the employer's behavior was outrageous and extreme, the entire circumstances of the workplace must be examined, including the rights and obligations set forth in the CBA, thus requiring that the state claim be preempted. *E.g.*, *McCormick v. AT&T Technologies*, 934 F.2d 531 (4th Cir. 1993) (*en banc*). Such courts treat IIED claims as the working conditions equivalent of the bad faith denial of insurance benefits that this Court found preempted in *Allis-Chalmers*; they can, therefore, reach a conclusion of preemption, as the court below did, without a careful

consideration of the specifics of the claim or of the factual context.[6] Other courts have been willing to give more detailed treatment to the question of preemption, and find no preemption when they decide that the employer's alleged conduct was so outrageous, or concerned matters so extraneous to the specific CBA involved in the case, that nothing in the CBA could possibly justify the conduct if the allegations in the complaint are proved.[7]

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[6] *E.g., Mock v. T.G.&Y. Stores*, 971 F.2d 522, 530 (10th Cir. 1992), *quoting Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1020-1021 (10th Cir. 1990). Paradoxically, the Ninth Circuit, which sometimes gives case-specific consideration to the ability of IIED claims to survive preemption, *e.g., Galvez v. Kuhn*, 933 F.2d 773, 779-780 (9th Cir. 1991), summarily determined in *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), that an IIED claim that was litigated along with a non-preempted handicap discrimination claim, *id.* at 548-550, was nevertheless preempted because the outrageousness of the IIED claim **could** (but might not) depend on whether the behavior violated the CBA. *Id.* at 550-551. *See also Jackson v. Southern California Gas Co.*, 881 F.2d 638, 645-646 (9th Cir. 1989) (dismissing as preempted an IIED claim based on the same conduct as a race discrimination claim that was not preempted).

[7] *E.g., Lightning v. Roadway Express*, 60 F.3d 1551 (11th Cir. 1995) (intense verbal abuse); *Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993) (alleged sexual harassment); *Milne Employee's Ass'n v. Sun Carriers*, 960 F.2d 1401, 1412-1413 (9th Cir. 1991) (IIED claim based on unfair termination preempted, IIED claim based on false representations of job security not preempted); *Hanks v. General Motors*, 906 F.2d 341 (8th Cir. 1990) (worker required to work with foreman indicted for molesting her daughter); *Keehr v. Consolidated Freightways*, 825 F.2d 133, 137-138 (7th Cir. 1987) (worker alleged abusive and insulting language); *Rasheed v. International Paper Co.*, 826 F. Supp.

(continued...)

As may be seen from the cases cited in the footnotes, a finding of no preemption is particularly likely where the tort is, as here, predicated on mistreatment based on race or gender. Indeed, in *Hirras v. National RR Passenger Corp.*, 48 F.3d 278, 283-284 (5th Cir. 1995), the Fifth Circuit itself, on remand from this Court based on *Norris*, refused to preempt an IIED claim based on sexual harassment. The court below did not even mention *Hirras*, not to speak of explaining why the CBA was irrelevant in that case but central to this one.

We wish to emphasize that our point here is not that the preemption question was necessarily decided wrongly in any of the cases cited from other circuits. Rather, the reason why these cases are all over the map — and why, in our judgment, employment law practitioners and employers alike find it very difficult to predict how the preemption issue will be resolved — is that the lower courts do not understand just how far *Lingle*'s non-preemption standard allows them to go in looking at a CBA where the claim is based on substantive state law.

This Court has, over the past few years, considered and rejected numerous petitions for certiorari from both sides in cases raising questions about how the *Lingle* standard should

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[7](...continued)
1377, 1386 (S.D. Ala. 1993) (racial discrimination). *See also Commodore v. University Mech. Contr.*, 120 Wash.2d 120, 135-137, 839 P.2d 314, 321-322 (1992) (racial discrimination); *Pikop v. Burlington Northern R. Co.*, 390 N.W.2d 743, 748-753 (Minn. 1986) (sexual harassment and national origin discrimination). *Cf. Nash v. AT&T Nassau Metals*, 381 S.E.2d 206, 209 (S.C. 1989) (case by case evaluation of preemption required; claim at issue preempted because claim is abuse of contractual privileges).

be applied. In *Norris* and *Livadas*, the Court extended the *Lingle* standard to cases involving the railroad and airline industries and to cases involving wage claims. The question with which lower courts continue to grapple, however, is what the *Lingle* standard means in practice — does an otherwise non-preempted case become preempted as soon as the employer raises a CBA-related defense to the state law claim? The widespread disagreement shows that the lower courts are struggling to apply the preemption rules established by this Court in *Allis-Chalmers* and *Lingle*. *See Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991); Note, *The Need for a New Approach to Federal Preemption of Union Members' State Claims*, 99 Yale L.J. 209, 209 (1989).

Both the lower courts and thousands of litigants need the Court's guidance on this question, and this case presents the question very cleanly in the context of race discrimination claims, whether presented as a statutory civil rights action or as a tort claim of outrageous conduct. Moreover, the context here shows that the decision below threatens to completely eviscerate the *Lingle* standard. The Court should therefore grant certiorari to resolve the conflict among the circuits over the extent to which a CBA may be considered in a *Lingle*-type case.

3. There is another reason why review by this Court will be of great significance to the lower courts. Under the analysis of the Fifth Circuit, the mere invocation of a CBA entitles the employer to remove every state-law-based employee claim to federal court, thereby substantially increasing the workload of the federal courts and requiring all CBA-based preemption claims to be decided there. This approach is squarely contrary to this Court's opinion concerning removal of cases based on alleged preemption by

concerning removal of cases based on alleged preemption by section 301 in *Caterpillar v. Williams*, 482 U.S. 386 (1987), and to this Court's analysis of *Caterpillar* in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989).

In *Caterpillar*, employees sued under state law to enforce contracts which, they alleged, were formed by Caterpillar's promises, made to them individually, that they would not be laid off if the plant were closed. Although this Court affirmed the holding that the case was improperly removed, it unanimously rejected the Ninth Circuit's reasoning. *Id.* at 391 n.4. The Court ruled that, even though a court must determine whether a plaintiff's complaint, properly pleaded, is based on federal or state law, the plaintiff may opt to avoid federal jurisdiction by exclusive reliance on state law. *Id.* at 392. Even the doctrine of complete preemption does not rob a plaintiff of this right, so long as the state law claim is not substantially dependent on a CBA. Thus, the *Caterpillar* plaintiffs asserted a breach of **individual** employment contracts, and even if they could also have asserted claims under the CBA, as masters of their complaint, they were free not to do so. *Id.* at 395. Because the complaint did not rely on a CBA, or even address the relationship between the individual contracts and the CBA, the claims did not arise under section 301, and the case was not removable based on the doctrine of complete preemption. *Id.* Even though Caterpillar was also arguing for preemption on the theory that the state law contract could not be enforced within the bargaining unit because of NLRA law, and the contract had to be construed in deciding the validity of that argument, that was still not enough to warrant removal:

> [T]he presence of a federal question, even a § 301 question, in a defensive argument does not

> overcome the paramount policies embodied in the well-pleaded complaint rule . . . [A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.
>
> 482 U.S. at 398-399 (emphasis in original).

This analysis was reaffirmed when the Court explained the significance of *Caterpillar* in *Oklahoma Tax Commission*, another removal case, although one not involving a CBA:

> In *Caterpillar*, we ruled that application of the well-pleaded complaint rule defeated federal-question jurisdiction, and therefore removability, in a case in which the employees sued on personal state employment contracts. We refused to characterize these state-law claims as arising under federal law **even though an interpretation of the collective-bargaining agreement might ultimately provide the employer a complete defense to the individual claims, and even though employee claims on the collective-bargaining agreement would have been the subject of original federal jurisdiction.**
> 489 U.S. at 841 (emphasis added).

Even before *Oklahoma Tax Commission,* the Tenth Circuit had followed *Caterpillar* by barring removal of state law claims based on the contention that they were waived in a CBA.[8] The Sixth and Eighth Circuits have also held that

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[8] *Plumbers Local 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889-890 (10th Cir. 1987).

the mere fact that, in addressing a defense based on an interpretation of a CBA, the state court might ultimately hold that a plaintiff's claim is preempted, does not warrant removal of that claim to federal court.[9] District court decisions in other circuits have reached that conclusion as well.[10] The Ninth Circuit, by contrast, has held that neither *Caterpillar* nor *Oklahoma Tax Commission* bars removal based on the invocation of the CBA as a defense to state law employment claims.[11]

Because of the view of many courts that a case is removable to federal court whenever section 301 may preempt all or part of state law claims, a most undesirable litigation dynamic is produced. Employers that have CBAs have every incentive to remove to federal court on grounds of section 301 preemption. They know that if they succeed in removing the case, the necessary result is that the entire case is preempted, and thus that they can defeat the state law

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[9] *Humphrey v. Sequentia*, 58 F.3d 1238, 1244 (8th Cir. 1995); *Tisdale v. Plumbers Local 704*, 25 F.3d 1308, 1313-1314 (1994); *Welch v. General Motors Corp.*, 922 F.2d 287, 291-292 (6th Cir. 1990); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1333-1334 and n.3 (6th Cir. 1989) (*en banc*) (case remanded even though interpretation of CBA might show absence of discriminatory animus).

[10] *E.g., Miller v. Fairchild Industries*, 668 F. Supp. 461, 467 (D. Md. 1987) (defendant claimed that supplemental CBA released all claims in connection with plant closing); *Machinists Local 967 v. General Elec. Co.*, 713 F. Supp. 547, 554-555 (N.D.N.Y. 1989); *Glass Molders v. Wickes Cos.*, 707 F. Supp. 174, 178 (D.N.J. 1989).

[11] *Stikes v. Chevron USA*, 914 F.2d 1265, 1268-1269 (9th Cir. 1990).

claim, without even having to get into the details of the case and show that the CBA, as they contend it should be construed, actually does provide a defense to the claim. Frequently, too, the employee-plaintiff's lawyer is a state court practitioner who rarely appears in federal court, thus adding to the employer's litigation advantage. And even if the case is remanded, it will be with the proviso that the state courts remain free to decide the preemption defense in the employer's favor. Removal is thus a no-lose proposition, and the result is that many more cases are imposed on the federal dockets (and an employee-plaintiff's litigation burdens become all the greater) than there ought to be. The Court should therefore grant certiorari in order to curtail this growing imposition on the federal courts, and to resolve the growing conflict among the lower courts about whether removal is proper.[12]

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[12] We note that, in the lower courts, this case was litigated on the assumption that the questions of preemption by section 301, and federal jurisdiction warranting removal to federal court, were one and the same. On this theory, all cases in which section 301 preempts state law are removable, and hence the only significant question is whether there is, in fact, preemption. Petitioner did not specifically discuss whether preemption through defensive use of the CBA raises different issues of federal jurisdiction than does the issue of whether there is preemption of a claim based on the well-pleaded elements of the plaintiff's case.

However, because this issue goes to the question of subject matter jurisdiction it may be raised at any time, and petitioner is obligated to note the problem once found by his new Supreme Court counsel. Moreover, as argued in the text, the basic misconception on the issue of jurisdiction that was shared by the parties and the courts below is widespread, and it has forced the federal courts to take jurisdiction of numerous cases in which the

(continued...)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 1996

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[12](...continued)
preemption question should be resolved in the state courts if there is an actual need to examine the CBA in litigation of the claims and defenses that are being raised.

APPENDIX

Raymond REECE, Plaintiff-Appellant,
v.
HOUSTON LIGHTING & POWER COMPANY,
Defendant-Appellee

No. 95-20646

United States Court of Appeals,
Fifth Circuit

April 10, 1996.

Michael S. Thomas, Thomas & Williams, Houston, TX, for plaintiff-appellant.

L. Chapman Smith, Matthew Paul Eastus, Baker and Botts, Houston, TX, for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BARKSDALE, DeMOSS and PARKER, Circuit Judge.

ROBERT M. PARKER, Circuit Judge:

I. FACTS AND PROCEEDINGS BELOW

Reece is an employee of HL & P, subject to a collective bargaining agreement (CBA) which contains a mandatory grievance and arbitration procedure. Reece filed suit against HL & P in state court, alleging that, on the basis of his race, he was (1) denied promotions and training; (2) retaliated against for engaging in a protected activity; and (3) subjected to intentional infliction of emotional distress. Reece never filed a grievance under the CBA, and the time for doing so has run.

HL & P answered and removed the case to federal court. The district court denied Reece's motion to remand, concluding that § 301 of the Labor Management Relations Act (LMRA) preempted Reece's causes of action. *See* 29 U.S.C. § 141, *et seq.* The district court then granted HL & P's motion for summary judgement, finding that Reece's claims were barred because of his failure to exhaust his mandatory administrative remedies under the CBA.

Reece appeals only the remand issue.

II. ANALYSIS

At issue is whether the district court properly concluded that § 301 of the LMRA preempted Reece's claims. Preemption is a question of law reviewed de novo. *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994). If the resolution of Reece's claims will require "interpretation" of the CBA, then the state-law remedies upon which Reece relies are preempted by § 301 of the LMRA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Thus, the dispute is whether the CBA must be interpreted in resolving Reece's clams.

A. *Discrimination Claim:*

To establish a *prima facie* case of discrimination under the Texas Labor Code, Reece would have to prove that he (1) was a member of a protected class; (2) suffered an adverse employment action; and (3) was treated dissimilarly from non-protected employees. *Farrington v. Sysco Food Serv., Inc.*, 865 S.W.2d 247, 251 (Tex.App.-Houston [1st Dist.] 1993, writ denied). If Reece were to establish a *prima facie* case, HL & P would then have the burden of articulating a legitimate, non-discriminatory reason for the allegedly unequal treatment. *Id.* Then the burden would shift

back to Reece to prove that the articulated reason was a pretext for unlawful discrimination. *Id.*

Reece's discrimination claim turns on questions of promotion, seniority, and assignment to training programs, all of which are provided for in the CBA. HL & P will undoubtedly rely on the CBA as its legitimate, non-discriminatory reason for Reece's treatment. When Reece then attempts to show that HL & P's stated reason is pretextual, the CBA would have to be interpreted because Reece would have to challenge HL & P's rights under the CBA. Thus, the interpretation of the CBA "is made necessary by an employer defense." Rebecca Hanner White, *Preemption of State Law Claims: A Model for Analysis*, 41 Ala.L.Rev. 377, 427 (1989).

B. *Intentional Infliction of Emotional Distress Claim:*

For Reece to sustain his claim of intentional infliction of emotional distress under Texas law, he must prove (1) HL & P acted intentionally or recklessly; (2) HL & P's conduct was extreme and outrageous; (3) such conduct caused emotional distress; and (4) such distress was severe. *Baker*, 34 F.3d at 280. In order to evaluate whether HL & P's conduct was "outrageous," the conduct must be measured against the CBA.

Thus, the resolution of Reece's claim will require interpretation of the CBA. Therefore, the claims are pre-empted by § 301 of the LMRA.

We acknowledge that the Ninth Circuit has taken a much more lenient view of preemption of state law discrimination claims. *See, e.g., Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 748 (9th Cir. 1993) ("In every case in which we have considered an action brought under the California Employment Act, we have held that it is not preempted by section 301.") (collecting cases). Nevertheless, we find that *Lingle* mandates our analysis.

This result is strengthened by the policies behind preemption in this context. The Supreme Court has recognized the unique need for uniformity in the interpretation of labor contracts:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of the federal labor policy.

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04, 82 S.Ct. 571, 577, 7 L.Ed.2d 593 (1962) (citations omitted).

Reece argues that the right to be free of discrimination is a non-negotiable state-law right that cannot be altered or waived by agreement. Nevertheless, *Lingle* forecloses such an argument: "It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on an interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301." *Lingle*, 486 U.S. at 407 n. 7, 108 S.Ct. at 1882 n. 7. The

situation described by the *Lingle* Court is the situation presented in this case.

The district court's denial of the motion to remand is therefore AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAY 02 1995
Michael N. Milby Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SQUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff VS. HOUSTON LIGHTING AND POWER COMPANY, Defendant	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging denial of promotion and work assignments in violation of state law is Plaintiff Raymond Reece's motion for remand (instrument #4). Because this Court agrees that Plaintiff's claims require interpretation of the collective bargaining agreement and are therefore preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), the Court

ORDERS that the motion is DENIED.

SIGNED at Houston, Texas on this 30th day of April, 1995.

Melinda Harmon /sig/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JUL 25 1995
Michael N. Milby Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff VS. HOUSTON LIGHTING AND POWER COMPANY, Defendant	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race are, *inter alia*, Plaintiff Raymond Reece's motion to amend interlocutory order (instrument #7), Plaintiff's motion for reconsideration of the Court's denial of his motion for remand (#8), Plaintiff's request for oral hearing on his motion for reconsideration (#9), and Plaintiff's unopposed motion to stay ruling on Defendant Houston Lighting and Power's motion for summary judgment pending resolution of Plaintiff's motion for reconsideration (#17). This action was removed on the basis of complete preemption under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185 *et seq.*, because Plaintiff is a bargaining unit employee and his claims require interpretation of the collective bargaining

agreement ("CBA"). The Court denied Plaintiff's motion to remand for the same reason on April 30, 1995.

Plaintiff requests amendment of the Court's order denying remand so that it can be immediately appealed. Because the matter is one of established law in this Circuit and because this Court finds no good reason for piecemeal litigation and delay in the instant suit, it denies the motion to amend its order.

Plaintiff moves the Court to reconsider its order denying remand because he asserts that his state-law claims for intentional infliction of emotional distress and race discrimination do not require interpretation of provisions of the CBA.

After reviewing the record and the applicable law, this Court has not changed its mind that removal was proper because of complete preemption by the LMRA. Plaintiff complains that Defendant's refusal to promote him to foreman or to assign him to certain training classes alone caused him emotional distress. Article XV, § 6 of the CBA governs Defendant's exclusive, discretionary right to select, promote, demote, transfer or assign head cable splicers after consideration by Defendant of "ability, skill, qualifications, performance, seniority, attendance and conduct," and with a right to file a grievance reserved to Plaintiff. To sustain a claim for emotional distress in Texas, a plaintiff must prove that (1) the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that defendant's conduct caused the plaintiff's emotional distress, and (4) that the emotional distress was severe. *Tidelands Automobile Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.). Thus as the alleged sole cause of his emotional distress, Defendant's refusal to promote Plaintiff or assign his [sic] to requested training must be extreme or outrageous to prevail on his claim. Because the emotional distress claim is unavoidably and inextricably intertwined with Defendant's conduct in failing to promote or assign Reece where Reece desired, the

essential element of extreme and outrageous conduct to establish intentional infliction of emotional distress implicates the provisions of the CBA that give Defendant the right to promote and to assign training. Thus the state law claim is preempted. *Baker v. Farmers Elec. Coop.*, 34 F.3d 274 (5th Cir. 1994); *see also Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278, 283 (5th Cir.1995) ("[I]f a CBA [can] be interpreted to give an employer the right to engage in conduct that is the subject of an emotional distress claim, an interpretation of the right granted by the CBA is necessary to the resolution of that claim," *citing Baker*, 34 F.3d at 280). Because Plaintiff's claim involves questions of promotability, seniority, and work assignments, it is inextricably intertwined with terms of the CBA that give Defendant the exclusive discretionary right to determine which employees will be promoted or trained. *Medrano v. Excel Corp.*, 985 F.2d 230, 233 (5th Cir.), *cert. denied*, 114 S. Ct. 79 (1993).

For these reasons the Court

ORDERS that Plaintiff's motion to amend interlocutory order and motion for reconsideration are DENIED. The Court further

ORDERS that Plaintiff's request for oral hearing and motion to stay ruling are MOOT.

SIGNED at Houston, Texas, this 24th day of July, 1995.

Melinda Harmon /sig/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
AUG 10 1995
Michael N. Milby Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff VS. HOUSTON LIGHTING AND POWER COMPANY, Defendant	CIVIL ACTION NO. H-95-1025

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race is Defendant Houston Lighting & Power Company's motion for summary judgment for failure to exhaust administrative remedies (instrument #15).

This Court has previously held that the claims of Plaintiff Raymond Reece, employed by Defendant as a head cable splicer and subject to a collective bargaining agreement ("CBA"), are preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1988). The CBA includes a mandatory grievance and arbitration procedure as the exclusive remedy for violations of the CBA[1]. Moreover the CBA requires that a grievance

[1] CBA, Art. XVI, §§ 1-2, 4.

must be filed within five days, and that any grievance not filed within the proscribed period "shall be conclusively deemed to have been waived." CBA, Art. XVI § 3. "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as a mode of redress [emphasis added]." *Republic Steel Corp v. Maddox*, 379 U.S. 650, 652 (1965). *See also Thomas v. LTV Corp.*, 39 F.3d 611, 621 (5th Cir. 1994)("[I]f the arbitration-and-grievance proceeding is the exclusive remedy for breach of the CBA, the employee may not sue his employer under section 301 until completion of the proceeding"); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985)("The law is completely clear that employees may not resort to state tort or contract claims in substitution for their rights under the grievance procedure in a collective bargaining agreement."); *Ross v. Runyon*, 858 F. Supp. 630, 634 (S.D. Tex. 1994) ("Before bringing suit, the employee must at least attempt to exhaust the grievance and arbitration procedures established by the bargaining agreement.") Defendant argues that Reece's failure to file a timely grievance and to exhaust these exclusive remedies under the CBA, which constitutes a violation of the CBA,[2] waives his right to pursue his claims and requires that summary judgment be granted to Defendant and that these now untimely claims be dismissed with prejudice. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976)("unless [the bargaining unit employee] attempted to utilize contractual procedures for settling his dispute with his employer, his independent suit against the employer in District Court would be dismissed"); *Parham v. Carrier Corp.*, 9 F.3d 383, 392 (5th Cir. 1993) ("we render a take-nothing judgement against Parham on his breach of

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[2] 2 CBA, Art. XVI, §§ 1-4.

collective bargaining agreement claims, for failure to invoke the grievance procedures required under the CBAs"); *Strachan*, 768 F.2d at 706-07 (affirming summary judgement for employer where state tort claims were preempted by federal law and employees failed to exhaust grievance procedures).

Conceding that if the LMRA preempts his claims because they require interpretation of the CBA, then he was required to exhaust grievance procedures established by the CBA, Plaintiff responds that pursuant to a continuing violation theory of discrimination, he has exhausted the exclusive grievance and arbitration procedures established by the collective bargaining agreement. On March 12, 1990, he filed a Charge of Discrimination (No. 330 90 1276) alleging that he was subjected to difference terms and conditions of employment because of his race. He also filed a grievance against Defendant for violations of the CBA, Article XV § 6, which was found by the Arbitrator to lack merit. He provides copies of both. Plaintiff then filed a lawsuit, *Raymond L. Reece v. Houston Lighting and Power Co.*, 234th Judicial District Court, Harris County, Texas, which was resolved by a settlement agreement and a final release on January 5, 1993. Plaintiff filed another Charge of Discrimination on April 18, 1994, alleging that since January 4, 1993, he had been retaliated against for having filed a lawsuit based on a previous charge of discrimination and had been denied training and promotions because of his race. He points out various instances of racial discrimination in training and promotions against blacks at HL&P.

Plaintiff notes that to establish a continuing violation he must show that the violation was part of a continuously maintained illegal employment practice. *Ross*, 858 F. Supp. at 637; *Perez v. Laredo Junior College*, 706 F.2d. 731, 734 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). He has shown the history of his charges and the application of an illegal policy toward him and others of his race. Moreover

since the settlement of his first lawsuit in January 1993, he has been passed over eight times for a promotion to crew leader/foreman positions for which he was qualified and which were assigned to white males, and he was demoted for a longer time for falsifying company documents and misuse of company assets than was a white male who tested positive of [sic] drug use. He notes that the settlement agreement required Defendant to expunge his personnel file of the Firm and Final Warning issued to him February 5, 1990, but no expungement took place. He therefore insists that fact issues exist as to whether Plaintiff exhausted his remedies under the CBA under a continuing violation theory.

Alternatively he argues that an employee does not have to exhaust available grievance procedures if exhaustion of those remedies would be futile. *Parham*, 9 F.3d at 390-91; *Rabelais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir. 1978). An employee has the burden of producing some evidence that use of the grievance procedure would be futile. *Parham*, 9 F.3d at 391. Accordingly Plaintiff points out that his grievance and first Charge of Discrimination were based on the CBA, Article XV, § 6, and that Defendant has asserted that the same provision governs Plaintiff's allegations here. Moreover he presents a portion of a letter dated July 25, 1990 from the Union's[3] legal counsel in reference to that part of the CBA:

> Moreover, we have, in the past arbitrated this issue, an issue indistinguishable from your client's grievance, and have done so without success. In other words not only does that

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[3] The International Brotherhood of Electrical Workers

> contract language[4] appear fairly clear, but an Arbitrator has interpreted that language so as to render your client's grievance without merit.

After reviewing the record, the Court finds that Plaintiff has not pleaded a continuing violation in his original petition, which has not been superseded. Instead his original petition references the Charge of Discrimination that he filed with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights on April 18, 1994, Charge No. 330942039, attached as exhibit A, and the subsequent Notice of Right to Sue letter. That charge focuses on an April 18, 1994 denial of promotion to foreman because of his race and in retaliation for filing the lawsuit. The petition further alleges ongoing failure to train on July 25, 1994 in retaliation for filing the April 18, 1994 charge. As its third and final allegation, the petition asserts that on August 9-11, 1994 Plaintiff was denied the opportunity to attend a "Troubleshooting Class" because of race and retaliation.

The Court notes that a plaintiff cannot use a continuing violation theory "to resurrect claims about discrimination concluded in the past . . . ." *McGregor v. Louisiana State University Bd. of Supervisors*, 3 F.3d 850, 867 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1103 (1994). Plaintiff's earlier claims were administratively exhausted, then settled during a lawsuit with a full and final release executed. Second, there is no mention in the petition of the previous charges on which he sought to exhaust the grievance

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[4] The Court notes that this letter refers to grievance filed by Plaintiff limited to his demotion from the status of "Head" Journeyman, to that of simply Journeyman.

The language referred to is the CBA's Article XV, § 6, "selection, promotion, demotion, transfer and/or assignment of Head Journeymen and Head Operators . . [are] within the sole discretion of the Company."

procedure under the CBA. Moreover retaliation is a distinct basis for alleging discriminatory conduct one never presented to the Arbitrator. Thus the Court rejects Plaintiff's continuing violation theory, apparently raised for the first time in response to Defendant's motion for summary judgment, as a means to circumvent the exhaustion requirement.

Nor does Plaintiff, who made no effort to exhaust his intraunion remedies,[5] make sufficient showing of futility to excuse his failure to attempt to use the grievance and arbitration procedure this time. Plaintiff makes no showing that the union officials who would hear his grievance were so hostile that he could not hope to obtain a fair hearing on his claims or that the grievance procedures would be inadequate or that they would unreasonably delay his opportunity to obtain judicial review. While the letter sent by the union counsel did not encourage Plaintiff to expect a good result, he was limited to his challenge to his demotion from the Head Journeyman position and constituted a realistic assessment of that narrow issue in light of the clear and unambiguous language of the CBA giving the Company complete discretion. By itself, without any effort on Plaintiff's side to attempt to use the exclusive grievance and arbitration remedies for his new and largely different claims, the letter cannot excuse Plaintiff from mandatory exhaustion requirements. Otherwise anyone with an unlikely chance of success could argue futility. Noting that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes . . .," and that the courts have held that an employee must have at least attempted to use them before initiating a lawsuit, the Fifth Circuit has stated, "The futility exception requires exactly that--futility. Before a plaintiff may safely

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[5] It is clear from Plaintiff's earlier grievance that he was fully aware of the need to exhaust remedies under the CBA.

disdain available grievance procedures, invoking those procedures must truly be futile: not annoying, bureaucratic, or *unpromising*, but futile. An employee has the burden of producing some evidence that resort to available grievance procedures would *in fact* be futile: his mere subjective belief or conclusory assertion would not suffice." *Parham*, 9 F.3d at 391 (emphasis added).

Accordingly, the Court

ORDERS that Defendant's motion for summary judgment is GRANTED and that Plaintiff's claims are DISMISSED with prejudice for failure to exhaust administrative remedies.

SIGNED at Houston, Texas, this 8th day of August, 1995.

Melinda Harmon /sig/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U. S.
FILED
AUG 23 1996
CLERK

No. 96-52

In The

Supreme Court of the United States

October Term, 1995

RAYMOND REECE,

Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly interpreted this Court's precedents in holding that, under the narrow factual scenario presented, Petitioner's state-law claims were preempted by federal labor law, and therefore removable, because they required an interpretation of a collective bargaining agreement.

PARTIES TO THE PROCEEDINGS

Petitioner:

RAYMOND REECE

Respondent:

HOUSTON LIGHTING & POWER COMPANY

Entities affiliated with Respondent:

DEVELOPMENT VENTURES, INC.; HOUSTON INDUSTRIES INCORPORATED; HOUSTON INDUSTRIES FINANCE, INC.; HOUSTON INDUSTRIES ENERGY, INC.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent requests that the Court deny the Petition for Certiorari ("Petition") seeking review of a decision by the United States Court of Appeals for the Fifth Circuit because this is a seniority dispute subject to a grievance-and-arbitration procedure, because there exists an adequate and independent basis for removal, because the Fifth Circuit's decision correctly interpreted the law, and because Petitioner's prediction of dire consequences for the judicial system arising from the decision below wholly lacks merit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 79 F.3d 485 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3084 (U.S. July 9, 1996) (No. 96-52), and appears in the Appendix to this brief at 1a-5a. The pertinent orders of the district court are reported at 66 Empl. Prac. Dec. (CCH) ¶ 43,680 (S. D. Tex. 1995), and 151 L.R.R.M. (BNA) 2477 (S. D. Tex. 1995). They are printed at App. 6a-13a and 14a-17a.

JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (1994) in that this action arose under the laws of the United States, specifically the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-187 (1994). The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C.

§ 1291 (1994). Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case implicates § 301(a) of the LMRA, 29 U.S.C. § 185(a), and the removal statute, 28 U.S.C. § 1441(1994).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below.

Petitioner Raymond Reece ("Petitioner") is a current employee of Respondent Houston Lighting & Power Company ("Respondent"). His employment is subject to a collective bargaining agreement ("CBA") between Respondent and the International Brotherhood of Electrical Workers, Local Union No. 66. In his Original Petition in Texas state court, Petitioner complained of being denied promotions and training opportunities out of line of his seniority as provided by the CBA. Respondent answered and removed the case to the United States District Court for the Southern District of Texas on the ground that a federal question was necessarily presented under *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968). Petitioner ostensibly pleaded causes of action for intentional infliction of emotional distress under Texas common law and for race discrimination and retaliation under the Texas Labor Code Ann. §§ 21.051, -.055 (Vernon

Supp. 1995).[1] Because the resolution of those claims would have required the interpretation of applicable collective bargaining agreement ("CBA") provisions dealing with seniority, training, and promotions, § 301 of the LMRA preempted both of Petitioner's causes of action.

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[1] Petitioner avers that he "deliberately confined his allegations to violations of state law, and pleaded no claim under . . . any other federal law." (Pet. at 4.) Petitioner's artful pleading is of no consequence in determining whether the district court had jurisdiction. As Petitioner is surely aware, but has conveniently neglected to mention, because Congress intended for "doctrines of federal labor law uniformly to prevail over inconsistent local rules," *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), this Court has concluded that the preemptive force of § 301 is so powerful that it displaces any state-law cause of action alleging, in form or substance, a breach of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 n.5 (1988). Furthermore, the Court has interpreted § 301 to preempt causes of action other than those denominated as breach of contract claims, *see, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218-19 (1985), so that the LMRA recharacterizes state-law claims that would require interpretation of a CBA into claims arising under federal law. *See United Steelworkers v. Rawson*, 495 U.S. 362, 366-67 (1990); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980) (per curiam) ("Mere omission of reference to LMRA § 301 in the complaint does not preclude federal subject matter jurisdiction. The court's recharacterization of Fristoe's complaint as one arising under § 301 is required by federal pre-emption doctrine. When principles of federal labor law are involved, they supersede state contract law or other state law theories."). Thus, how Petitioner chose to style his claims has no bearing on whether those claims actually present a controversy arising under federal law.

The district court denied Petitioner's motion to remand. (App., *infra*, 14a.) Petitioner then sought reconsideration of the order denying remand, which the district court also denied, concluding that § 301 preempted Petitioner's causes of action because they involved "questions of promotability, seniority, and work assignments," which rendered them "inextricably intertwined with the terms of the CBA." (App., *infra*, 16a.) Subsequently, Respondent moved for summary judgment on the ground that Petitioner failed to exhaust his contractual remedies and that his claims were time-barred. The district court granted Respondent's motion, finding no basis for Petitioner's failure to invoke the contractually exclusive grievance-and-arbitration procedures. (App., *infra*, 12a.)

Petitioner appealed, but he sought review only of the denial of his motion to remand, not of the summary judgment. The United States Court of Appeals for the Fifth Circuit affirmed the order denying remand, concluding that, under *Lingle*, 486 U.S. at 407 n.7, Petitioner's statutory discrimination claim was inextricably intertwined with the CBA, notwithstanding the "nonnegotiable" nature of the rights he purported to invoke. (App., *infra*, 3a.) Alternatively, the Fifth Circuit held that Petitioner's common law emotional stress claim was also preempted, which likewise supported removal. (App., *infra*, 3a-4a.)

B. Statement of Facts.

The opinion of the Fifth Circuit correctly sets forth the facts of the case. In the interest of brevity, Respondent

respectfully directs the Court's attention to that opinion. (App., *infra*, 1a-2a.)

REASONS WHY THE WRIT SHOULD BE DENIED

I. Seniority Disputes, Such as the One Raised by Petitioner, are Redressable Through the Grievance-and-Arbitration Machinery.

Seniority is at the heart of Petitioner's case. Petitioner's theory of recovery centers on the allegation that "white employees *with less seniority than he*" received training and promotions to which he was entitled. (Pet. at 3 (emphasis added).). Seniority is one of the factors for consideration in selecting and assigning employees, such as Petitioner. "Seniority" is also the subject of an entire article of the CBA. (R. at 000079-75.)

This Court long ago recognized that "[s]eniority arises only out of contract or statute. An employee has no inherent right to seniority in service. . . . In private employment seniority is typically created and delimited by a collective bargaining agreement." *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 n.21 (1947) (citations omitted). Unless a party contends that an entire seniority system is discriminatory,[2] a contention Petitioner has never advanced, disputes about the seniority provisions of a CBA are not redressable under federal or state anti-discrimination laws or common-law tort theories, but rather through the contractual grievance-and-arbitration machinery or a suit under § 301 of the LMRA. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 554 (1964)

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[2] *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 904-05 (1989).

("There is thus no question that had a dispute concerning any of these subjects, such as seniority rights or severance pay, arisen between the Union and [Interscience][,] . . . it would have been arbitrable."); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566-68 (1960) (holding that dispute over reinstatement of employee under seniority provision was subject to mandatory arbitration clause).[3] Petitioner's claims present just the sort of garden variety seniority disputes that the Court in *John Wiley & Sons* indicated are subject to arbitration.[4]

Petitioner believes his seniority should have entitled him to various promotions and training opportunities. The CBA, however, governs work assignments (such as

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[3] *See also Kelly v. American Tel. & Tel. Co.*, Civ. No. 91-179-P-H, 1993 WL 206289, at *5 (D. Me. Apr. 20, 1993) ("The CBA between AT&T and IBEW is the immediate source of the plaintiff's rights concerning seniority, vacation, and shift choices. Because her claims are substantially dependent on the terms of the CBA, the LMRA preempts them. . . . "); *DuPuis v. International Bhd. of Elec. Workers, Local 58*, 119 L.R.R.M. (BNA) 2033, 2035-36 (E.D. Mich. 1984) (stating that "[s]eniority . . . has long been a quintessential issue of collective bargaining" and holding that employee's common law breach of contract action concerning seniority rights was preempted by § 301).

[4] The CBA between Respondent and IBEW Local No. 66 provides for the arbitration of any grievance and defines a "grievance" as: "[A]ny dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against." (CBA, art. XVI, § 1; R. at 000082.) The CBA also provides that "[t]here shall be no unlawful discrimination against an employee by the Company, Union or any other employee because of race, color, disability, religion, age (over 40), sex or national origin. The same standards will apply to veterans of the Vietnam era." (CBA, Purpose; R. at 000107.)

training) and promotions for employees having Petitioner's job classification. (CBA, art. XV, § 6; R. at 000085.) A determination of the extent to which the CBA required that Respondent consider Petitioner's seniority in making these sorts of decisions would necessarily have entailed a construction of the CBA. The need for a state court to interpret Petitioner's seniority rights in order to adjudicate his causes of action leads to their preemption by the LMRA. *See Davis v. Johnson Controls, Inc.*, 21 F.3d 866, 868 (8th Cir.) (holding that state-law discrimination claim was preempted where court would "interpret[ ] the provisions of the [collective bargaining] agreement relating to seniority rights"), *cert. denied*, 115 S. Ct. 426 (1994); *cf. United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 63-64 (1981) ("Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between company and union."); *Humphrey v. Moore*, 375 U.S. 335, 343-44 (1964) (stating that dispute concerning seniority rights of all employees, even if brought in state court, was "one arising under § 301 of the Labor Management Relations Act and is a case controlled by federal law") (citations omitted).

II. Because the Decision Below Did Not Rely Solely on the Preemption of Petitioner's Statutory Race Discrimination Claim as a Basis For Denying Remand, This Case Does Not Represent an Appropriate Vehicle for Reaching the Merits of the Central Issue Raised in the Petition.

A. Despite Petitioner's Attempt to Commingle His Causes of Action Under the Heading of "Employment Discrimination Complaints," He Has Pleaded Two Independent Claims.

This Court has stated on numerous occasions that it "reviews judgments, not opinions." *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) (same); *Texas v. Hopwood*, No. 95-1773, slip op. at 1 (U.S. July 1, 1996) (opinion of Ginsberg, J., concerning denial of petition for writ of certiorari). Pursuant to this rule, "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Accordingly, this Court has declined to review cases when there exists an adequate and independent basis to support the judgment. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964) (denying certiorari despite a live conflict regarding whether federal or state law controlled because it was evident that the resolution of that conflict could not change the result reached below); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue in conflict among the circuits] can await a day

when the issue is posed less abstractly."). That principle applies to this case because the preemption of Petitioner's emotional distress claim warranted denial of the motion to remand whether or not Petitioner's discrimination claims were preempted.

Petitioner seeks to conflate his disparate claims under the heading of "employment discrimination complaints." (Pet. at 8.) In particular, he styles his claims under the Texas Labor Code as a "statutory discrimination claims"[5] and his emotional distress cause of action as a "tortious discrimination claim." (*Id.* at 7.)[6] Petitioner may not avoid the adequate and independent basis rule by reformulating his causes of action at this stage of the proceedings. Petitioner pleaded two independent causes of action, one for the state-law tort of intentional infliction of emotional distress, and another for race discrimination and retaliation in violation of the Texas Labor Code §§ 21.051, -.055. (App., *infra*, 2a-3a.)

Texas law holds that the tort of intentional infliction of emotional distress does not encompass "mere employment disputes," and the tort does not apply to discrimination claims. *MacArthur v. University of Tex. Health Care Ctr. at Tyler*, 45 F.3d 890, 898-99 (5th Cir. 1995) (applying Texas law); *Ugalde v W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993) (applying Texas law) (holding that calling employee "Mexican" and "wetback" was not actionable in tort and stating that "[e]ven conduct which

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[5] *Id.* at 6.

[6] *See also id.* at 16 (acknowledging that Petitioner is attempting to recharacterize "his racial discrimination claim in the form of the tort of intentional infliction of emotional distress").

may be illegal in an employment context may not be the sort of conduct constituting extreme and outrageous conduct"); *Cook v. Fidelity Inv.*, 908 F. Supp. 438, 441 (N.D. Tex. 1995) (applying Texas law) ("Cook's allegations in connection with this [emotional distress] claim are duplicative of his allegation supporting his racial discrimination claims. The allegations do not give rise to an additional claim for intentional infliction of emotional distress."). Indeed, absent federal and state antidiscrimination statutes, the common law generally does prohibit discrimination on any basis by a private employer. *See* Lex K. Larson, Employment Discrimination § T117.10, at T-2895 to T-2896 (1996) ("Congress enacted these [antidiscrimination] laws against the backdrop of an established doctrine of American employment law, under which an employer can discharge an employee at will 'for good cause, for no cause or even for cause morally wrong.' Outside of the discrimination laws and some special purpose statutes, there is simply no general statutory law which alters this basic rule."). Petitioner's exclusive remedy for employment discrimination under Texas law is an action under chapter 21 of the Texas Labor Code. *See Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991) (stating that provisions of Texas antidiscrimination statute are "mandatory and exclusive"); *see also Stinnett v. Williamson County Sheriff's Dep't*, 858 S.W.2d 573, 576 (Tex. Ct. App. 1993).

In this case, the adverse employment decisions, irrespective of their motivation, constituted the "outrageous" conduct giving rise to the tort claim.[7] By contrast,

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[7] Such conduct is arguably not even actionable under the claimed tort theory. *Johnson v. Merrell Dow Pharmaceuticals, Inc.*,

Petitioner's statutory discrimination claims are dependent upon Respondent's alleged racial animus in making various employment decisions. (Pet. at 12.) Petitioner's two causes of action are thus self-contained and distinct.

B. The Preemption of Petitioner's Emotional Distress Claim, Which Is Substantially Dependent on an Analysis of the CBA, Adequately Supports the Judgment.

The Court should deny the Petition because preemption of the tort claim provided an independent basis for removal and the denial of remand. Petitioner only appealed the district court's denial of his motion to remand, not the summary judgment. The Fifth Circuit found that both of Petitioner's claims were preempted by the LMRA and that remand was properly denied. (App., *infra*, 3a, 5a.) Only one of Petitioner's claims need be preempted in order to support removal,[8] and preemption of the emotional distress claim would support the judgment below even if the court of appeals' disposition of Petitioner's statutory discrimination claim were reversed.

The test for preemption of a state-law tort claim is well-settled: the LMRA preempts "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in

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965 F.2d 31, 33-34 (5th Cir. 1992) (per curiam) (applying Texas law).

[8] *Graef v. Chemical Leaman Tank Lines*, 860 F. Supp. 1170, 1172-74 (E. D. Tex. 1994). *See also Rodriguez v. Pacificare of Tex., Inc.*, 980 F.2d 1014, 1016-19 (5th Cir.) (holding that district court had supplemental jurisdiction over non-preempted claims under 28 U.S.C. § 1367), *cert. denied*, 508 U.S. 956 (1993).

a labor contract." *Lueck*, 471 U.S. at 220; *see also International Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 858 (1987) ("[A] tort claim 'inextricably intertwined with the consideration of the terms of the labor contract' is preempted under § 301. . . . "). Under this test, the Court held in *Lueck*,[9] *Hechler*,[10] and *United Steelworkers v. Rawson*[11] that the tort claims at issue could not survive LMRA preemption because they could not "be described as independent of the collective-bargaining agreement." *Rawson*, 495 U.S. at 371. Similarly, numerous courts of appeals have held that the LMRA generally preempts claims for intentional infliction of emotional distress when the claims relate to terms and conditions of employment and are largely dependent on the terms of a CBA.[12]

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[9] 471 U.S. at 211.

[10] 481 U.S. at 859.

[11] 495 U.S. 362, 371 (1990).

[12] *See, e.g., DeCoe v. General Motors Corp.*, 32 F.3d 212, 219-20 (6th Cir. 1994); *Bagby v. General Motors Corp.*, 976 F.2d 919, 921-22 (5th Cir. 1992); *Mock v. T.G.&Y Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 536-37 (4th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1048 (1992); *Douglas v. American Info. Technologies Corp.*, 877 F.2d 565, 572 (7th Cir. 1989); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989); *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1149-50 (9th Cir. 1988); *Knafel v. Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d 1155, 1162 (6th Cir. 1988); *Bradshaw v. General Motors Corp., Fisher Body Div.*, 805 F.2d 110, 111 (3d Cir. 1986); *Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1350 (9th Cir. 1985).

The circumstances of this case demonstrate that Petitioner's emotional distress claim is preempted. Under Texas law, for Petitioner to sustain his emotional distress claim he must prove[13] that "(1) the defendants acted intentionally or recklessly; (2) the defendants' conduct was extreme and outrageous; (3) the defendants' actions caused . . . [Petitioner's] emotional distress; and (4) . . . [Petitioner's] emotional distress was severe." *Baker v. Farmers Elec. Co-op., Inc.*, 34 F.3d 274, 280 (5th Cir. 1994) (applying Texas law). If any of the elements of Petitioner's emotional distress claim requires an interpretation of the CBA, § 301 preempts it. *Stikes v. Chevron U.S.A., Inc.*, 914 F.2d 1265, 1268 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991).

The "outrageous" conduct on which Petitioner relies pertains to basic employment-related matters such as seniority, promotion, and training – all of which are regulated by the CBA. (R. at 000053-52.) Petitioner alleges, inter alia, that "the conduct of HL&P as described above" in his Original Petition caused him to suffer "great anxiety, mental anguish, indignation, disappointment and wounded pride." (Pl.'s Orig. Pet. ¶ VI; R. at 000053.) The "described above" conduct appears in Paragraph V of the Original Petition, which detailed the promotions and training opportunities denied Petitioner, allegedly in violation of the CBA's seniority provisions. (R. at 000053.)

To establish this claim, Petitioner must prove that the promotions that were denied to him, the misapplication

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[13] In Texas, "the employee has the burden of proving wrongful conduct by the employer." *Thomas v. LTV Corp.*, 39 F.3d 611, 619 (5th Cir. 1994) (applying Texas law).

of the seniority preference in such decisions, and that the refusals of his requests for training classes constituted "extreme and outrageous" conduct. This burden entails proof that the employer's actions or decisions were wrongful, i.e., that at a minimum they violated the CBA. For this reason alone Petitioner's claim is preempted. *Thomas*, 39 F.3d at 619 ("Thomas must demonstrate that LTV's conduct was wrongful under the circumstances. To determine whether LTV's conduct was wrongful under the circumstances, an analysis of the collective bargaining agreement is necessary."). As one commentator has noted, "[w]hen the conduct arises out of the employer-employee relationship and a collective bargaining agreement is in place, the employer's conduct necessarily must be examined against the contract. . . . That inquiry itself, moreover, involves a question of federal contract interpretation, thus preempting the claim." Rebecca Hanner White, *Preemption of State Law Claims: A Model for Analysis*, 41 Ala. L. Rev. 377, 420 (1989) (citing *Newberry*, 854 F.2d at 1146; *Knafel*, 850 F.2d at 1162); *see also Truex*, 784 F.2d at 1350.

The CBA contains the following provisions with regard to the selection, promotion, transfer, and/or assignment of employees covered thereby, including "Head Journeymen," Petitioner's classification:

> *Selection, promotion,* demotion, *transfer* and/or *assignment* of *Head Journeymen* and Head Operators listed in this article or elsewhere in this Agreement shall be within the sole discretion of the Company, and shall be with the approval of the Department Head. Consideration may

include, but is not limited to, ability, skill, qualifications, performance, *seniority*, attendance, and conduct.[14]

Except as to *Head Journeymen* and Head Operators as described in Article XI, Section 6, in the event of *promotions*, layoffs, or a permanent reduction in the working force, where ability, skill and qualifications are equal, *seniority* shall govern. When Company dètermines to *transfer* employees from one location to another, Company will request volunteers and select the *senior* volunteers where ability, skill and qualifications are equal; if there are not sufficient volunteers with the required ability, skill and qualifications, Company will select the employees with the *least seniority* where ability, skill and qualifications are equal. The Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article XVI. *Promotions* to positions not covered by the Agreement shall be within the sole discretion of the Company. Temporary positions may be filled at the discretion of the Company. With the exception of *replacements* or *promotions* made necessary because of illness or leaves of absence, a *temporary position* shall not exceed ninety (90) work days.[15]

"Seniority" is defined in art. XVII, §§ 5-6:

Section 1. An employee shall be considered a probationary employee and shall not acquire any *seniority* until completion of one hundred fifty (150) work days in the employ of the Company. During such period, said employee's employment may be terminated at any time

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[14] CBA, art. XV, § 6; R. at 000085 (emphasis added).

[15] CBA, art. XVII, § 3; R. at 000076 (emphasis added).

with or without cause. After such period, said employee shall be a regular employee and his *seniority* shall date from his original date of employment. If two or more employees have the same original date of employment, their relative *seniority positions* shall be determined by random draw.

Section 5. *Seniority* and continuity of service shall be terminated when an employee quits or is discharged for cause.

If the employee has not quit or been discharged for cause, his *seniority* and continuity of service may be considered terminated where,

(a) An employee is laid off for a period exceeding one (1) year;

(b) An employee fails to return to work after the termination of an authorized leave of absence;

(c) An employee fails to report to work within three (3) scheduled days after notice to report to work;

(d) An employee is absent three (3) consecutive scheduled days without permission.

Section 6. The Company shall post on bulletin boards within ninety (90) days after the execution date of this Agreement a list showing the hiring date of each employee and will revise the same semi-annually. An employee may protest his *seniority* position within a period of thirty (30) days after the posting of such list, and if dissatisfied with Company action thereon may assert a grievance under Article XVI; provided that failure to protest within said thirty (30) days shall constitute a waiver of any further right of protest, and the *seniority* position set

> forth in said list shall be conclusively deemed to be correct.

R. at 000079-65 (emphasis added).

The emotional distress claim thus implicates, and will require interpretation of, the terms of the CBA in the analysis of whether Respondent's conduct, including its use or non-use of seniority as a criterion in the relevant employment decisions, was "extreme and outrageous." *See Thomas*, 39 F.3d at 619; *Douglas*, 877 F.2d at 572 ("If Illinois Bell's conduct . . . was authorized under the collective bargaining agreement. . . . then it would have been exercising its 'legal rights in a permissible way.' Such conduct cannot be characterized as 'extreme and outrageous. . . . ' ") (quoting *Public Fin. Corp. v. Davis*, 360 N.E.2d 765, 768-69 (Ill. 1976)). Since Petitioner's emotional distress claim is "inextricably intertwined" with the CBA's provisions regarding seniority, and its clauses relating to the promotion and assignment of employees, his common law tort claim must yield to § 301. *Hechler*, 481 U.S. at 862 (holding that plaintiff's tort claim was preempted because "it is clear that 'questions of contract interpretation . . . underlie any finding of tort liability' "). The preemption of Petitioner's tort claim therefore allowed Respondent to remove this case and provided a sufficient basis for denying remand.

III. Because the Court of Appeals Correctly and Narrowly Applied This Court's Decision in *Lingle* in Connection With Petitioner's Discrimination Claim, the Purported Conflict With the Decisions of This Court is Illusory.

Petitioner forecasts that, as a result of the decision below, the "mere invocation" of a CBA will provide a successful basis for removal under the LMRA, and that

the decision "will *always* lead to preemption of both discrimination and retaliation cases." (Pet. at 15.) These assertions distort the import of the Fifth Circuit's decision, which is a straightforward and correct application of *Lingle*.

A. The Court of Appeals Used the Proper Test for LMRA Preemption.

Petitioner suggests that, under the decision below, preemption would occur *whenever* a party claimed that a court would have to "*look at* the CBA." (Pet. at 6, emphasis added).) Petitioner multifariously suggests that the court of appeals' decision would mandate preemption in any case when "the CBA could be relevant to the disposition of a state law claim,"[16] when the "employer did no more than point to a provision in the CBA,"[17] or when "the employer has *asserted* justifications based on the CBA."[18] Petitioner ultimately predicts that, under the court of appeals' decision, "the mere invocation of a CBA entitles the employer to remove every state-law-based employee claim to federal court."[19] Petitioner protests too much.

The court of appeals followed the law as enunciated in *Lueck* and *Lingle*. The court observed that, "[i]f the resolution of Reece's claims will require 'interpretation' of the CBA, then the state-law remedies upon which Reece relies are preempted by § 301 of the LMRA." (App., *infra*, 2a (citing *Lingle*, 486 U.S. at 405-06).) The court of

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[16] *Id.* at 11.

[17] *Id.* at 12.

[18] *Id.* at 16.

[19] *Id.* at 19.

appeals further noted that "the dispute is whether the CBA must be interpreted in resolving Reece's claims." (*Id.*)[20] These standards accord fully with this Court's statement in *Lingle* that, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is preempted," 486 U.S. at 405-06, and its statement in *Lueck* that LMRA preemption occurs "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220. *See also Rawson*, 495 U.S. at 371; *Hechler*, 481 U.S. at 858. Thus, Petitioner's suggestion that the circuit court's decision "stands virtually alone" in its approach to LMRA preemption does not survive even cursory scrutiny.[21]

Additionally, contrary to Petitioner's unwarranted all-or-nothing preemption argument, the circuit court's decision does not hold that "state law[s] are automatically preempted" whenever a CBA is implicated. (Pet. at 8.) Nor does it stand for the proposition that the LMRA will "always" preempt a state antidiscrimination claim. To the contrary, this case presents a narrow, factually distinct case, the *"rare case"* to which the Supreme Court adverted in *Lingle* when it observed that the assertion of a

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[20] *Id.* at 3a ("[T]he CBA would have to be interpreted because Reece would have to challenge HL&P's rights under the CBA.").

[21] Petitioner's reliance on *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2248 (1994), a case involving the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1988), is misplaced. *Norris* purported to rely on the *Lingle* preemption standard. Thus, *Lingle*, along with *Lueck*, continues to constitute the proper rule of decision in LMRA preemption cases.

"nonnegotiable" state-law right does not automatically exempt claims from preemption, and that such claims may be preempted in certain instances. *Lingle*, 486 U.S. at 408 n.7. The Fifth Circuit correctly concluded that "[t]he situation described by the *Lingle* Court is the situation presented in this case," (App., *infra*, 5a), because Petitioner's complaints about training opportunities, promotions, and seniority are without merit unless Respondent is found to have violated the CBA. Petitioner's theory of the case, and the particular employment decisions about which he complains, depend on a construction of his contractual seniority rights and are therefore preempted under this discrete set of facts. *Id.*

B. The Court of Appeals Correctly Followed *Lingle*'s Holding That a "Nonnegotiable" State-Law Right Must Succumb to LMRA Preemption in Certain Instances.

1. *Lingle* Contemplated the Preemption of "Nonnegotiable" Rights.

To the extent Petitioner argues that the result below was anomalous and that it is "contrary to decisions of this Court,"[22] he has failed to explain (or even acknowledge) the fact that the court of appeals expressly followed, and indeed quoted from,[23] this Court's decision in *Lingle*:

> Petitioner points to the fact that the Illinois right to be free from retaliatory discharge is nonnegotiable and applies to unionized and nonunionized workers alike. While it may be true

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[22] Pet. at 8.

[23] App., *infra*, 5a.

> that most state laws that are not pre-empted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpre-emption. It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301. Similarly, if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be pre-empted.

Lingle, 486 U.S. at 407-08 n.7.[24] Indeed one wonders how the application of the law *as stated in* Lingle could

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[24] Other courts have applied this passage from *Lingle* in accordance with the Fifth Circuit's treatment of it to find that "nonnegotiable" rights were preempted. *See, e.g., Davis*, 21 F.3d at 868 (holding that LMRA preempted disability discrimination claim under Missouri Human Rights Act which "would require an examination of the seniority rights of both Davis and other employees under the collective bargaining agreement"); *Stikes*, 914 F.2d at 1268 (holding that state right to privacy claim, "even if . . . nonnegotiable in the collective bargaining process," was preempted under *Lingle*); *Cole v. General Motors Corp.*, 641 F. Supp. 28, 32 (W.D. Mich. 1984) (holding that LMRA preempted claim under Michigan antidiscrimination statute because "application of the . . . [state statute] could potentially alter or abrogate rights and duties which GMC and the UAW have collectively bargained for"). Accordingly, to the extent Petitioner relies on *Ramirez v. Fox Television Station*, 998 F.2d 743, 749 (9th Cir. 1993), to suggest that the court of appeals' decision in this case is aberrant, Respondent respectfully suggests that *Ramirez*, in failing even to cite note 7 from *Lingle*, is out of step with the prevailing law. *See Ramirez*, 998 F.2d at 748 (stating, contrary to *Lingle*, that the LMRA never preempts "causes of action which assert nonnegotiable state law rights") (quotation

"threaten[ ] to completely eviscerate the *Lingle* standard,"[25] as Petitioner contends.

2. Petitioner's "Nonnegotiable" Statutory Right is Preempted in This Case Because Resolution of the Claim is Substantially Dependent Upon an Interpretation of the CBA.

In order to determine whether Petitioner's discrimination claim under the Texas Labor Code is preempted, a court "must examine whether proof of the state law claim requires interpretation of [the] collective bargaining agreement terms." *DeCoe*, 32 F.3d at 216. Once again, preemption occurs "if *any* of the elements require a construction of the agreement." *Stikes*, 914 F.2d at 1268 (emphasis added).[26]

To establish a prima facie case under the Texas Labor Code, Petitioner has the burden of proving (1) that he was a member of a protected class; (2) that he experienced an adverse employment decision; and (3) that non-protected employees were treated dissimilarly. *See Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 90 n.9 (Tex. Ct. App. 1995) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). If Petitioner carried this burden, Respondent would be required to articulate legitimate, non-discriminatory reasons "sufficient to raise a genuine issue of fact that its employment action was not the result

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marks omitted). Respondent further observes that the seniority issues central to the instant case were not at issue in *Ramirez*. *Id.* at 745-46.

[25] Pet. at 19.

[26] *See also Leonardis v. Burns Int'l Sec. Servs., Inc.*, 808 F. Supp. 1165, 1183 n.24 (D.N.J. 1992).

of discriminatory animus but instead was motivated by a legitimate reason." *Id.* The burden would then shift back to the employee "and merge[ ] with [his] ultimate burden of persuading the trier of fact that the employer's proffered reason for its action is mere pretext and that [he] has been the victim of unlawful discrimination." *Id.* Furthermore, the Texas Supreme Court has acknowledged that the standard for recovery under the statute requires proof of "but for" causation. *See Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995) (stating in whistleblower case that the causation standard in this "and similar cases" is whether, "without it [the protected trait or conduct], the employer's prohibited conduct would not have occurred when it did").

Petitioner's burden of establishing an adverse employment action requires, as a threshold, proof that he had a right or entitlement to a promotion or other opportunity. Answering the question whether Petitioner possessed *any* such entitlement requires consideration of the provisions of the CBA that provide that *"[s]election, promotion . . . transfer* and/or *assignment* of Head Journeymen . . . shall be within the sole discretion of the Company, and . . . [c]onsideration may include, but is not limited to, ability, skill, qualifications, performance, *seniority*, attendance, and conduct," and that "[e]xcept as to Head Journeymen . . . in the event of *promotions* . . . where ability, skill and qualifications are equal, *seniority* shall govern." (CBA, art. XVII, § 3, R. at 000077 (emphasis added).) Petitioner also alleges that "he has been denied the requested training and thereby denied access to *promotional* opportunities within HL&P because

of his race"[27] and that he "was denied a *promotion*" when "a white employee with *less seniority* than Plaintiff, John Malarka, was *promoted.*" (R. at 000053 (emphasis added).) Additionally, Petitioner asserts that he has "been denied the opportunity to train in the Fiber Optics program" and "has been denied the opportunity to attend 'Troubleshooting Class.' " (*Id.*)

The CBA delineates seniority as one of several factors for consideration in promotion analyses. (R. at 000085, 000079-000065.) Consequently, in order to evaluate the disparate treatment prong of Petitioner's prima facie case, and in order to determine whether Respondent's reasons for the adverse employment decisions were pretextual, *see Austin State Hosp.*, 903 S.W.2d at 90 n.9, a court would have to determine whether Petitioner had a contractual right to the promotion and training opportunities at issue, and whether Respondent somehow abused its contractual right to make promotion and work assignment decisions, including the weight, if any, to be afforded to seniority. Moreover, deciding "but for" causation under *Hinds* would require a court to undertake a determination of whether, due to the seniority preference Petitioner deems controlling, he would have been promoted and given the requested training if race were not allegedly a factor in the employment decisions at issue. *Hinds*, 904 S.W.2d at 636. In sum, it is simply not possible for Petitioner to establish a cause of action under the Texas Labor Code claim in this case without interpreting, and perhaps even attempting to supersede, the terms of the CBA.

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[27] R. at 000054.

This conclusion flows from the fact that Petitioner's Texas Labor Code claim is expressly based on Respondent's supposed failure to follow the dictates of the CBA's seniority provisions. (*See* R. at 000027 (stating that a white employee *"with less seniority than Plaintiff . . . was promoted"*) (emphasis added).) As Professor White noted in discussing an analogous case, "[w]hen . . . the employer denies retaliation and claims its actions were dictated by the contract, an analysis of the contract necessarily must occur." White, 41 Ala. L. Rev. at 431. Moreover, Professor White has observed that "[w]ere a court to examine the seniority system and find there were positions available, the asserted motivation should be deemed pretextual. *But it is precisely this inquiry that section 301 forbids. Whenever such analysis must occur, the claim ought to be preempted." Id.* n.232 (emphasis added). In the case at bar, Respondent denied Petitioner's allegations and contended that "[a]ll actions taken by HL&P concerning Reece's employment, including his promotional opportunities, were for reasons other than Reece's race." (R. at 000010.) Under the narrow factual setting of this case, because Petitioner's theory of recovery is tied to seniority, training, and promotions, the LMRA preempts Petitioner's race discrimination claim under *Lingle*. 486 U.S. at 407-08 n.7.

IV. Petitioner's Objections to an "Undesirable Litigation Dynamic" Resulting from *Avco* Do Not Justify Granting the Writ.

Petitioner finally contends that the Court should reconsider its post-*Avco*[28] labor law jurisprudence.

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[28] 390 U.S. at 560.

Indeed, he apparently seeks to have this Court overrule *Avco* itself. In particular, Petitioner laments the fact that *Avco* allows a defendant to remove a state court suit when the claims asserted would require the interpretation of a CBA. This result, he claims, "substantially increas[es] the workload of the federal courts." (Pet. at 19; *id.* at 23 ("[T]he result is that many more cases are imposed on the federal dockets (and an employee-plaintiff's litigation burdens become all the greater) than there ought to be.").)[29]

Petitioner's argument is unfounded. In *Local 174, Teamsters v. Lucas Flour Co.*, this Court observed that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." 369 U.S. at 103-04 (citations omitted). Moreover, "in enacting § 301 Congress intended doctrines

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[29] Petitioner also bemoans the "employer's litigation advantage" arising from the fact that "[f]requently . . . the employee-plaintiff's lawyer is a state court practitioner who rarely appears in federal court." (Pet. at 23.) Aside from being a gross generalization with absolutely no empirical support, Petitioner's argument is simply not a basis for granting Supreme Court review. In the civil context, the federal courts simply do not concern themselves with the alleged quality or experience of counsel. *Cf. United States v. Cronic*, 466 U.S. 648, 665 (1984) (noting that counsel are presumed to be competent and holding that youth and inexperience of counsel did not provide basis for claim of ineffective assistance of counsel); *Square Liner 360 Degrees, Inc. v. Chisum*, 691 F.2d 362, 374-75 (8th Cir. 1982) (stating that inexperienced counsel did not deprive civil litigant of its " 'day in court' ").

of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104.[30] The Supreme Court thus determined in *Lucas Flour* that a "state rule that purports to define the meaning or scope of a term in a contract suit therefore is preempted by federal labor law," and in *Lueck* the Court extended this rule to cases "alleging liability in tort." *Lueck*, 471 U.S. at 210-11.

In order to guarantee that federal labor law remains preeminent in § 301 suits and that it was construed consistently, the Court applied *Lucas Flour* in *Avco*, 390 U.S. at 560, to hold that an employer may properly remove a suit brought in state court asserting claims that are substantially dependent upon a construction of a CBA "despite the plaintiff's failure to plead a federal cause of action, because the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization." *Lingle*, 486 U.S. at 406 n.5 (citations and quotation marks omitted). Thus, the removability of state-law claims preempted by the LMRA derives directly from *Avco*, and Petitioner's argument regarding an "undesirable litigation dynamic" amounts to nothing more than an expression of dissatisfaction with that result. Obviously, something more substantial than the rationale offered thus far by Petitioner must be advanced to justify a request to overrule a holding as well-settled

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[30] *See also Lueck*, 471 U.S. at 210-11 ("[T]he policies that animate § 301 . . . require that 'the relationships created by [a collective-bargaining] agreement' be defined by application of 'an evolving federal, common law grounded in national labor policy.' ") (quoting *Bowen v. United States Postal Serv.*, 459 U.S. 212, 224-25 (1983)) (second alteration by Court).

and widely accepted as the removability principle of *Avco*.[31]

In addition, if this Court overruled *Avco* and disallowed the removal of state-law claims preempted by the LMRA, "all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211. As this Court cogently explained in *Lueck*:

> The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate. Exclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.'

Id. (quoting *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962)). Petitioner offers no reason to doubt the wisdom of the *Lueck* Court's observation.

Finally, the Court should be chary of accepting Petitioner's invitation to overrule *Avco* and to diminish the preemptive effect of § 301 because of the deleterious

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[31] In support of his anti-*Avco* argument, Petitioner cites two cases that are distinguishable from this one. As Petitioner admits, *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989), was "not one involving a CBA," (Pet. at 21), or even the LMRA, but rather a suit for the recovery of excise taxes from an Indian tribe and centered on sovereign immunity issues. *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), involved the alleged breach of several individual employment contracts through the announcement of a layoff. It did not involve tort and statutory claims pertaining to a current employee's seniority rights, as does the instant case.

consequences of this action on "the central role of arbitration in our 'system of industrial self-government.' " *Lueck*, 471 U.S. at 219 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)). As this Court has declared, "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Lucas Flour*, 369 U.S. at 104. "Grievance and arbitration are important cogs in the machinery." *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 121 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989). Adopting Petitioner's argument would raise the same grave concerns expressed by this Court in *Lueck*:

> Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*. The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is preempted, their federal right to decide who is to resolve contract disputes will be lost.

471 U.S. at 219 (citation omitted). Consequently, the Court should reject Petitioner's ill-considered invitation because, as the First Circuit correctly concluded, "[a] plaintiff should not be allowed to bypass the grievance procedures established by the labor contract in a case where his claims are so clearly dependent on interpretation of the terms of that contract. Allowing such an end

run would surely undermine the structure of industrial self-government."[32]

CONCLUSION

For the foregoing reasons, the Court should deny the Writ.

Respectfully submitted,

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[32] *Jackson*, 863 F.2d at 122.

APPENDIX A

RAYMOND L. REECE, Plaintiff-Appellant,

v.

HOUSTON LIGHTING & POWER COMPANY, Defendants-Appellee.

NO. 95-20646.

United States Court of Appeals,

Fifth Circuit.

April 10, 1996.

Appeal from the United States District Court for the Southern District of Texas.

Before BARKSDALE, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

I. FACTS AND PROCEEDINGS BELOW

Reece is an employee of HL&P, subject to a collective bargaining agreement (CBA) which contains a mandatory grievance and arbitration procedure. Reece filed suit against HL&P in state court, alleging that, on the basis of his race, he was (1) denied promotions and training; (2) retaliated against for engaging in a protected activity; and (3) subjected to the intentional infliction of emotional distress. Reece never filed a grievance under the CBA, and the time for doing so has run.

HL&P answered and removed the case to federal court. The district court denied Reece's motion to remand, concluding that § 301 of the Labor Management

Relations Act (LMRA) preempted Reece's causes of action. *See* 29 U.S.C. § 141, *et seq.* The district court then granted HL&P's motion for summary judgment, finding that Reece's claims were barred because of his failure to exhaust his mandatory administrative remedies under the CBA.

Reece appeals only the remand issue.

II. ANALYSIS

At issue is whether the district court properly concluded that § 3401 of the LMRA preempted Reece's claims. Preemption is a question of law reviewed de novo. *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994). If the resolution of Reece's claims will require "interpretation" of the CBA, then the state-law remedies upon which Reece relies are preempted by § 301 of the LMRA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L.Ed.2d 410 (1988). Thus, the dispute is whether the CBA must be interpreted in resolving Reece's claims.

A. *Discrimination Claim*:

To establish a *prima facie* case of discrimination under the Texas Labor Code, Reece would have to prove that he (1) was a member of a protected class; (2) suffered an adverse employment action; and (3) was treated dissimilarly from the non-protestant employees. *Farrington v. Sysco Food Serv., Inc.* 865 S.W.2d 247, 251 (Tex. App. – Houston [1st Dist.] 1993, writ denied). If Reece were to establish a *prima facie* case, HL&P would then have the

burden of articulating a legitimate, non-discriminatory reason for the allegedly unequal treatment. *Id.* Then the burden would shift back to Reece to prove that the articulated reason was a pretext for unlawful discrimination. *Id.*

Reece's discrimination claim turns on questions of promotion, seniority, and assignment to training programs, all of which are provided for in the CBA. HL&P will undoubtedly rely on the CBA as its legitimate, non-discriminatory reason for Reece's treatment. When Reece then attempts to show that HL&P's stated reason is pretextual, the CBA would have to be interpreted because Reece would have to challenge HL&P's rights under the CBA. Thus, the interpretation of the CBA "is made necessary by an employer defense." Rebecca Hanner White, *Preemption of State Law Claims: A Model for Analysis*, 41 Ala. L. Rev. 377, 427 (1989).

B. *Intentional Infliction of Emotional Distress Claim:*

For Reece to sustain his claim of intentional infliction of emotional distress under Texas law, he must prove that (1) HL&P acted intentionally or recklessly; (2) HL&P's conduct was extreme and outrageous; (3) such conduct caused emotional distress; and (4) such distress was severe. *Baker*, 34 F.3d at 280. In order to evaluate whether HL&P's conduct was "outrageous." the conduct must be measured against the CBA.

Thus, the resolution of Reece's claims will require interpretation of the CBA. Therefore, the claims are preempted by § 301 of the LMRA.

We acknowledge that the Ninth Circuit has taken a much more lenient view of preemption of state law discrimination claims. *See, e.g., Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 748 (9th Cir. 1993) ("In every case in which we have considered an action brought under the California Employment Act, we have held that it is not preempted by section 301.") (collecting cases). Nevertheless, we find that *Lingle* mandates our analysis.

This result is strengthened by the policies behind preemption in this context. The Supreme Court has recognized the unique need for uniformity in the interpretation of labor contracts:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contact provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing. . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peach. State law which frustrates the effort of congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04, 82 S. Ct. 571, 577, 7 L.Ed.2d 593 (1962) (citations omitted).

[8] Reece argues that the right to be free of discrimination is a non-negotiable state-law right that cannot be altered or waived by agreement. Nevertheless, *Lingle* forecloses such an argument: "It is conceivable that a State could create a remedy that, although non-negotiable, nonetheless turned on an interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301." *Lingle*, 486 U.S. at 407 n.7, 108 S. Ct. at 1882 n.7. The situation described by the *Lingle* Court is the situation presented in this case.

The district court's denial of the motion to remand is therefore AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE Plaintiff	§ § §	
VS.	§	CIVIL ACTION NO.
HOUSTON LIGHTING & POWER CO.,	§ §	H-95-1025
Defendant	§	

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race is Defendant Houston Lighting & Power Company's motion for summary judgment for failure to exhaust administrative remedies (instrument #15).

This Court has previously held that the claims of Plaintiff Raymond Reece, employed by Defendant as a head cable splicer and subject to a collective bargaining agreement ("CBA"), are preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1988). The CBA includes a mandatory grievance and arbitration procedure as the exclusive remedy for violations of the CBA.[33] Moreover the CBA requires that a grievance must be filed within five days, and that any grievance not filed within the proscribed period "shall be conclusively

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[33] CBA, Art. XVI, §§ 1-2, 4.

deemed to have been waived." CBA, Art. XVI § 3. "as a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as a mode of redress [emphasis added]." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). *See also Thomas v. LTV Corp.*, 39 F.3d 611, 621 (5th Cir. 1994) ("[I]f the arbitration-and-grievance proceeding is the exclusive remedy for breach of the CBA, the employee may not sue his employer under section 301 until completion of the proceeding"); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985) ("The law is completely clear that employees may not resort to state tort or contract claims in substitution for their rights under the grievance procedure in a collective bargaining agreement."); *Ross v. Runyon*, 858 F. Supp. 630, 634 (S.D. Tex. 1994) ("Before bringing suit, the employee must at least attempt to exhaust the grievance and arbitration procedures established by the bargaining agreement.") Defendant argues that Reece's failure to file a timely grievance and to exhaust these exclusive remedies under the CBA, which constitutes a violation of the CBA,[34] waives his right to pursue his claims and requires that summary judgment be granted to Defendant and that these now untimely claims be dismissed with prejudice. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976) ("unless [the bargaining unit employee] attempted to utilize contractual procedures for settling his dispute with his employer, his independent suit against the

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[34] CBA, Art. XVI, §§ 1-4.

employer in District Court would be dismissed"); *Parham v. Carrier Corp.*, 9 F.3d 383, 392 (5th Cir. 1993) ("we render a take-nothing judgment against Parham on his breach of collective bargaining agreement claims, for failure to invoke the grievance procedures required under the CBAs"); *Strachan*, 768 F.2d at 706-07 (affirming summary judgment for employer where state tort claims were pre-empted by federal law and employees failed to exhaust grievance procedures).

Conceding that if the LMRA preempts his claims because they require interpretation of the CBA, then he was required to exhaust grievance procedures established by the CBA, Plaintiff responds that pursuant to a continuing violation theory of discrimination, he has exhausted the exclusive grievance and arbitration procedures established by the collective bargaining agreement. On March 12, 1990, he filed a Charge of Discrimination (No. 330 90 1276) alleging that he was subjected to different terms and conditions of employment because of his race. He also filed a grievance against Defendant for violations of the CBA, Article XV § 6, which was found by the Arbitrator to lack merit. He provides copies of both. Plaintiff filed a lawsuit, *Raymond L. Reece v. Houston Lighting and Power Co.*, 234th Judicial District Court, Harris County, Texas, which was resolved by a settlement agreement and a final release on January 5, 1993. Plaintiff filed another Charge of Discrimination on April 18, 1994, alleging that since January 4, 1993, he had been retaliated against for having filed a lawsuit based on a previous charge of discrimination and had been denied training and promotions because of his race. He points out various instances

of racial discrimination in training and promotion against blacks at HL&P.

Plaintiff notes that to establish a continuing violation he must show that the violation was part of a continuously maintained illegal employment practice. *Ross*, 858 F. Supp. at 637; *Perez v. Laredo Junior College*, 706 F.2d 731, 734 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). He has shown the history of his charges and the application of an illegal policy toward him and others of his race. Moreover since the settlement of his first lawsuit in January 1993, he has been passed over eight times for a promotion to crew leader/foreman positions for which he was qualified and which were assigned to white males, and he was demoted for a longer time for falsifying company documents and misuse of company assets than was a white male who tested positive of drug use. He notes that the settlement agreement required Defendant to expunge his personnel file of the Firm and Final Warning issued to him on February 5, 1990, but no expungement took place. He therefore insists that fact issues exist as to whether Plaintiff exhausted his remedies under the CBA under a continuing violation theory.

Alternatively he argues that an employee does not have to exhaust available grievance procedures if exhaustion of those remedies would be futile. *Parham*, 9 F.3d at 390-91; *Rabelais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir. 1978). An employee has the burden of producing some evidence that use of the grievance procedure would be futile. *Parham*, 9 F.3d at 391. Accordingly Plaintiff points out that his grievance and first Charge of Discrimination were based on the CBA, Article XV, § 6, and that Defendant has asserted that the same provision governs

Plaintiff's allegations here. Moreover he presents a portion of a letter dated July 25, 1990 from the Union's[35] legal counsel in reference to that part of the CBA:

> Moreover, we have, in the past arbitrated this issue, an issue indistinguishable from your client's grievance, and have done so without success. In other words not only does that contract language[36] appear fairly clear, but an Arbitrator has interpreted that language so as to render your client's grievance without merit.

After reviewing the record, the Court finds that Plaintiff has not pleaded a continuing violation in his original petition, which has not been superseded. Instead his original petition references the Charge of Discrimination that he filed with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights on April 18, 1994, Charge No. 330942039, attached as exhibit A, and the subsequent Notice of Right to Sue letter. That charge focuses on an April 18, 1994 denial of promotion to foreman because of his race and in retaliation for filing the lawsuit. The petition further alleges ongoing failure to train on July 25, 1994 in retaliation for filing the April 18, 1994 charge. As its third and final allegation, the petition asserts that on August 9-11, 1994

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[35] The International Brotherhood of Electrical Workers

[36] The Court notes that this letter refers to grievance filed by Plaintiff limited to his demotion from the status of "Head" Journeyman, to that of simply Journeyman.

The language referred to is the CBA's Article XV, § 6, "selection, promotion, demotion, transfer and/or assignment of Head Journeymen and Head Operators . . . [are] within the sole discretion of the Company."

Plaintiff was denied the opportunity to attend a "Trouble-shooting Class" because of race and retaliation.

The Court notes that a plaintiff cannot use a continuing violation theory "to resurrect claims about discrimination concluded in the past. . . . " *McGregor v. Louisiana State University Bd. of Supervisors*, 3 F. 3d 850, 867 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1103 (1994). Plaintiff's earlier claims were administratively exhausted, then settled during a lawsuit with a full and final release executed. Second, there is no mention in the petition of the previous charges on which he sought to exhaust the grievance procedure under the CBA. Moreover retaliation is a distinct basis for alleging discriminatory conduct, one never presented to the Arbitrator. Thus the Court rejects Plaintiff's continuing violation theory, apparently raised for the first time in response to Defendant's motion for summary judgment, as a means to circumvent the exhaustion requirement.

Nor does Plaintiff, who made no effort to exhaust his intra union remedies,[37] make sufficient showing of futility to excuse his failure to attempt to use the grievance and arbitration procedure this time. Plaintiff makes no showing that the union officials who would hear his grievance were so hostile that he could not hope to obtain a fair hearing on his claims or that the grievance procedures would be inadequate or that they would unreasonably delay his opportunity to obtain judicial review.

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[37] It is clear from Plaintiff's earlier grievance that he was fully aware of the need to exhaust remedies under the CBA.

While the letter sent by the union counsel did not encourage Plaintiff to expect a good result, it was limited to his challenge to his demotion from the Head Journeyman position and constituted a realistic assessment of that narrow issue in light of the clear and unambiguous language of the CBA giving the Company complete discretion. By itself, without any effort on Plaintiff's side to attempt to use the exclusive grievance and arbitration remedies for his new and largely different claims, the letter cannot excuse Plaintiff from mandatory exhaustion requirements. Otherwise anyone with an unlikely chance of success could argue futility. Noting that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes . . . ," and that the courts have held that an employee must have at least attempted to use them before initiating a lawsuit, the Fifth Circuit has stated, "The futility exception requires exactly that – futility. Before a plaintiff may safely disdain available grievance procedures, invoking those procedures must truly be futile: not annoying bureaucratic, or unpromising, but futile. An employee has the burden of producing some evidence that resort to available grievance procedures would in fact be futile: his mere subjective belief or conclusory assertion would not suffice." *Parham*, 9 F.3d at 391 (emphasis added).

Accordingly, the Court

ORDERS that Defendant's motion for summary judgment is GRANTED and that Plaintiff's claims are DISMISSED with prejudice for failure to exhaust administrative remedies.

SIGNED at Houston, Texas, this 8th day of August, 1995.

MELINDA HARMON /S/
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff, vs. HOUSTON LIGHTING & POWER CO., Defendant.	§ § § § § § § § §	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race are, *inter alia*, Plaintiff Raymond Reece's motion to amend interlocutory order (instrument #7), Plaintiff's motion for reconsideration of the Court's denial of his motion for remand (#8), Plaintiff's request for oral hearing on his motion for reconsideration (#9), and Plaintiff's unopposed motion to stay ruling on Defendant Houston Lighting & Power's motion for reconsideration (#17). This action was removed on the basis of complete preemption under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185 *et seq.*, because Plaintiff is a bargaining unit employee and his claims require interpretation of the collective bargaining agreement ("CBA"). The Court denied Plaintiff's motion to remand for the same reason on April 30, 1995.

Plaintiff requests amendment of the Court's order denying remand so that it can be immediately appealed. Because the matter is one of established law in this Circuit and because this Court finds no good reason for piecemeal litigation and delay in the instant suit, it denies the motion to amend its order.

Plaintiff moves the Court to reconsider its order denying remand because he asserts that his state-law claims for intentional infliction of emotional distress and race discrimination do not require interpretation of provisions of the CBA.

After reviewing the record and the applicable law, this Court has not changed its mind that removal was proper because of complete preemption of the LMRA. Plaintiff complains that Defendant's refusal to promote him to foreman or to assign him to certain training classes alone caused him emotional distress. Article XV, § 6 of the CBA governs Defendant's exclusive, discretionary right to select, promote, demote, transfer or assign head cable splicers after consideration by Defendant or "ability, skill, qualifications, performance, seniority, attendance and conduct," and with a right to file a grievance reserved to Plaintiff. To sustain a claim for emotional distress in Texas, a plaintiff must prove that (1) the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that defendant's conduct caused the plaintiff's emotional distress, and (4) that the emotional distress was severe. *Tidelands Automobile Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App. – Beaumont 1985, writ ref'd n.r.e.). Thus as the alleged sole cause of his emotional distress, Defendant's refusal to promote Plaintiff or assign him to requested training

must be extreme or outrageous to prevail on his claim. Because the emotional distress claim is unavoidably and inextricably intertwined with Defendant's conduct in failing to promote or assign Reece where Reece desired, the essential element of extreme and outrageous conduct to establish intentional infliction of emotional distress implicates the provisions of the CBA that give Defendant the right to promote and to assign training. Thus the state law claim is preempted. *Baker v. Farmers Elec. Coop.*, 34 F.3d 274 (5th Cir. 1994); *see also Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278, 283 (5th Cir. 1995) ("[I]f a CBA [can] be interpreted to give an employer the right to engage in conduct that is the subject of an emotional distress claim, an interpretation of the right granted by the CBA is necessary to the resolution of that claim," *citing Baker*, 34 F.3d at 280). Because Plaintiff's claim involves questions of promotability, seniority, and work assignments, it is inextricably intertwined with terms of the CBA that give Defendant the exclusive discretionary right to determine which employees will be promoted or trained. *Medrano v. Excel Corp.*, 985 F.2d 230, 233 (5th Cir.), *cert. denied*, 114 S. Ct. 79 (1993).

For these reasons the Court

ORDERS that Plaintiff's motion to amend interlocutory order and motion for reconsideration are DENIED. The Court further

ORDERS that Plaintiff's request for oral hearing and motion to stay ruling are MOOT.

SIGNED at Houston, Texas this 24th day of July, 1995.

MELINDA HARMON /S/
UNITED STATES DISTRICT JUDGE

RAYMOND REECE, Plaintiff, vs. HOUSTON LIGHTING & POWER CO., Defendant.	§ § § § § § § §	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging denial of the promotion and work assignments in violation of state law is Plaintiff Raymond Reece's motion for remand (instrument #4). Because this Court agrees that Plaintiff's claims require interpretation in the collective bargaining agreement and are therefore preempted by section 301 of the Labor Management Relation Act ("LMRA"), 29 U.S.C. § 185(a), the Court

ORDERS that the motion is DENIED.

SIGNED at Houston, Texas this 30th day of April, 1995.

MELINDA HARMON /S/
UNITED STATES DISTRICT JUDGE

(3)

Supreme Court, U.S.
FILED
SEP 04 1996
OFFICE OF THE CLERK

No. 96-52

In the
Supreme Court of the United States
OCTOBER TERM,

RAYMOND REECE,
Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM IN SUPPORT OF CERTIORARI

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No. 96-52

In the

Supreme Court of the United States

OCTOBER TERM,

RAYMOND REECE,

Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM IN SUPPORT OF CERTIORARI

Respondent's Brief in Opposition to the Petition for a Writ of Certiorari ("Opp.") further underscores the need for this Court's review of the issues in this case — whether state law claims of racial discrimination are completely preempted by section 301 of the Labor-Management Relations Act ("LMRA"), and so automatically removable to federal court, simply because the employer raises the collective bargaining agreement ("CBA") as a defense to the state law claim.

Perhaps most significant, respondent does not deny that the lower federal and state courts are in considerable disagreement in their treatment of the preemption of statutory anti-discrimination claims, and are truly in disarray over the preemption of common law emotional distress claims. Respondent expressly acknowledges the direct conflict between the Fifth and Ninth Circuits, Opp. 21-22 n.24, but ignores the widespread disagreement among the lower courts described in the Petition at 13-15, 16-18, 21-22. Respondent's

elaborate answer is that the Fifth Circuit and the various courts that have sided with it are right on the preemption issue, and that other courts are wrong. But none of that, even if accepted, would sustain the principal flaw in the ruling below — its vast expansion of removal jurisdiction.[1]

A. The Removal Issue.

Respondent recognizes, at the outset of its Opposition, that removal based solely on preemption is at the heart of this case. To show that removal was proper, respondent then proceeds with an extensive analysis of the preemption question, and indeed, suggests that, if the Court concludes that the case was properly removed based on the inclusion of a claim of intentional infliction of emotional distress ("IIED"), then it would be unnecessary to decide whether the statutory discrimination claim was preempted. We address that erroneous argument below, at 7-8 n.2; for now, it suffices to note that, under respondent's analysis, the issues of removal and preemption are one and the same. Thus, to decide whether a case like this one is properly removed, a district judge must first conduct an exhaustive analysis of the merits of the employer's preemption defense, like the twenty pages of preemption argument that respondent devotes to it here. And it must be addressed with the benefit of only such authorities as the parties can assemble within the tight schedule allowed by 28 U.S.C. §§ 1446(b) and 1447(c) for removal petitions and remand motions, and with no discovery or other elaboration of the plaintiff's claim. It is precisely to avoid the need for federal courts to resolve the merits of cases, in order to decide whether they have jurisdiction, that petitioner asks the Court to grant review here to enforce the rulings in *Caterpillar v. Williams*, 482 U.S. 386 (1987), and *Oklahoma Tax*

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[1] Respondent does not object to the Court's consideration of petitioner's "removal based on a CBA defense" argument. *Cf.* Pet. at 23-24 n.12. Any objections to consideration of that part of the question are therefore waived. Rule 15.2.

Commission v. Graham, 489 U.S. 838 (1989), that it is the rare case in which a federal claim not pleaded in the complaint can ever be removed based on complete preemption.

We acknowledge that a plaintiff whose state cause of action actually seeks to enforce a CBA cannot avoid removal by artful pleading where a disputed CBA-based claim is necessary to the success of the action. *See* Opp. 3 n.1. But, by the same token, as the Court stressed in *Caterpillar*, the artful pleading doctrine does not trump the plaintiff's right to be master of his own complaint. 482 U.S. at 394-395, 397. If the plaintiff chooses to rely **only** on state law claims and not on the CBA, neither the fact that the plaintiff might also have claims under the CBA, as respondent contends he does, Opp. 5-7, nor the fact that respondent may point to the CBA to **negate** plaintiff's claims, as the court of appeals ruled and respondent also contends, Opp. 19 and n.20, warrants removal to federal court.

Contrary to respondent's accusation, Opp. 25-30, petitioner does not question *Avco Corp. v. Machinists Lodge No. 735*, 390 U.S. 557 (1968). To the contrary, that case prescribes a removal principle that is far narrower than respondent suggests. In *Avco*, an employer had sued in state court for the avowed purpose of enforcing a CBA's no-strike clause, and the Court held only that such cases, whether brought in state or federal court, arise exclusively under federal law and hence are removable. The Court did not hold in *Avco* that state employment discrimination or tort cases necessarily arise solely under federal law, and *Caterpillar* and *Oklahoma Tax Commission* make clear the limits of this removal doctrine, in that a complaint based on state law grounds may not be removed simply because the CBA may negate those claims. Far from showing why the holding and reasoning of these cases does not forbid removal here, respondent contents itself with a brief footnote which points out irrelevant factual distinctions between those cases and this one. Opp. 28 n.31.

Respondent also contends the case was removable because, with respect to one of the ways in which petitioner claims to have been subjected to racial discrimination — the denial of a promotion to foreman on one occasion — his complaint noted that a white employee with less seniority had received that promotion. Because seniority rights themselves are a creature of contract, respondent argues, all of petitioner's claims necessarily depend on the CBA and consequently are preempted and, in turn, removable. Respondent argues that this shows that the holding of the Court below actually and properly rests on a "rare" set of facts requiring reference to a CBA to resolve a state law discrimination complaint.

This defense of the decision below fails as a reason to avoid certiorari for several reasons. First, although we do not doubt that a decision may be affirmed for reasons not cited by the lower court, the Fifth Circuit did not rely on, or even refer to, this allegation in the complaint in explaining why petitioner's claims were preempted and hence removable. Quite to the contrary, the court of appeals made no bones about the fact that preemption was based on the fact that "the interpretation of the CBA is made necessary by an employer's defense." Pet. App. 3a.

Nor, in fact, is that alternate ground for affirmance present here. Neither petitioner's complaint as a whole, nor even the one fragment that respondent cites, rests on the CBA. The complaint, which appears as Item F in the Record Excerpts below, and has been lodged with the Clerk, is based on allegations of racial discrimination. The alleged discrimination is set forth in numbered paragraphs IV (actually consisting of two unnumbered paragraphs) and V (actually consisting of three unnumbered paragraphs). The reference to the seniority of a white employee who received one of the promotions that petitioner was denied is contained in one of the three subparagraphs of paragraph V, and was intended to show the existence of evidentiary support for petitioner's contention that he was denied this promotion not for one of the most commonly proffered legitimate reasons — that the

other candidate had more experience — but for racial reasons only.

Moreover, even that promotion-denial claim does not depend on an interpretation of the CBA. There is no dispute about where petitioner stands on the seniority list; nor does petitioner contend that he was entitled, under the CBA, to the promotion (or to training opportunities, for that matter). To be sure, if there were a dispute about those facts, it might prove necessary to construe the CBA in order to resolve that dispute. But this Court said in *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2078 (1994), that the mere fact that contract terms must be consulted in the course of deciding a state law claim does not suffice to preempt the state law claim. And, finally, if the CBA is only a defense, as the Fifth Circuit stated in finding preemption, *Caterpillar* makes clear that that is not a basis for removal.

2. The Preemption Issue.

Respondent's arguments against review of the preemption issues in the case are similarly faulty. It contends first that promotion and training questions may be resolved by the CBA's grievance and arbitration procedure. Opp. 5-7. This argument is legally irrelevant because this Court squarely held in *Lingle v. Norge*, 486 U.S. 399 (1988), that the fact that a state law claim may be parallel to one that could have been presented under a CBA does not warrant preemption by the LMRA. The argument is also somewhat disingenuous because the CBA in this case, as respondent observes later in its Opposition, at 14-16, expressly reserves to respondent the sole discretion to assign head journeymen like petitioner or to promote them to higher positions. Indeed, respondent has consistently maintained, and in other litigation it has successfully argued to the Fifth Circuit, that even for rank-and-file employees, for whom the CBA does not expressly reserve such discretion, the right to file a grievance over promotions does not empower an arbitrator to second-guess respondent's assessments of employee ability, skill or qualifications. *Houston Lighting & Power Co. v. IBEW Local 66*, 71 F.3d

179 (5th Cir. 1995), *cert. pending*, No. 95-1757. Thus, respondent's contention that petitioner could have brought a seniority grievance is mystifying at best.

In an effort to treat this case as sui generis, and hence not worthy of review, respondent claims that its reliance on portions of the CBA in defense of a charge of violation of state law is rare. In fact, it is quite typical of what happens in cases alleging racial discrimination, or retaliation for filing a workers compensation or other state law claim, or indeed handicap discrimination. An employee alleges that he or she was treated differently from other workers. The employer replies that the employee was treated the same as other workers, citing either common workplace rules, such as those in a CBA, or specific examples of persons who received similar treatment. Then the employee responds by trying to show that the employer's counterexamples involved different considerations and hence are being cited pretextually. Accordingly, if respondent were correct that the presence of such an employer defense is enough to require preemption (and hence removal), then all unionized employers will be able to exempt themselves from state law employment claims.

This case would have been no different if the CBA said that there is no such thing as seniority in this workplace. In that event, petitioner's claim against respondent would nevertheless be the same, and could be pursued against respondent under state law without necessitating any examination of the CBA. In such a situation, the petitioner's claim would be almost identical to that of a non-unionized, "at-will" employee who worked without the coverage of any CBA or other contractual provision for seniority. Even in such circumstances, it often happens that persons who have worked for the employer for a longer time are more likely, for a variety of reasons, to be given chances for training and promotion, and in such cases the fact that a particular employee who happened to be black was repeatedly passed over in favor of less experienced white employees would surely be an evidentiary point supporting a claim of discrimination. Just as this

evidentiary point may be invoked in such a case without preempting the state law claim, so may it be invoked here.

That the CBA here does include seniority provisions, while withholding any seniority benefits with respect to promotion and assignments for head journeymen like petitioner, actually makes it much like the hypothetical at-will workplace or non-seniority CBA discussed above. But if references to seniority are sufficient to warrant preemption of state law claims, then it is hard to imagine **any** state law claim that would not be held preempted once the court below reached this stage of the analysis. Thus, far from being sui generis, the holding below logically stands for the proposition that an employer defense based on the CBA will almost always suffice to warrant preemption of a state law claim.[2]

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[2] Respondent contends that petitioner did not appeal from the summary judgment below, but only from the order of remand, and consequently that if the emotional distress claim was properly held to be preempted and therefore removable, it is unnecessary to reach the question of whether the statutory discrimination claim was preempted and therefore removable. Opp. 11. This argument is without basis. Both the Notice of Appeal, *see* Record Excerpts, Item B, and petitioner's brief below, *see* Statement of the Case, page 1, expressly attacked the order granting summary judgment; that brief not only discussed the preemption issues at great length, but relied primarily on cases that involved only preemption and not removal. Respondent's brief was similarly addressed, in principal part, to issues of preemption, and expressly acknowledged that "[t]he primary dispute centers on whether, under the particular facts of this case, the LMRA preempts Reece's race discrimination claim under the Texas Labor Code." Br. at 5. The issue was therefore fully preserved below.

Moreover, even if the case had been properly removed based on preemption of the emotional distress claim, the judgment below could not be affirmed in its entirety unless petitioner's statutory discrimination claim was also preempted. And, indeed, even if preemption of the emotional distress claim is proper, the lower

(continued...)

Respondent's effort to avoid review of the preemption of the emotional distress ("IIED") component of petitioner's race discrimination claim should also be rejected. In its Opposition, at 9-10, respondent suggests for the first time that Texas law does not permit IIED claims to be brought either in the employment context generally, or based on allegations of race discrimination specifically. This argument was not advanced either in the court of appeals (respondent's brief in that court has been lodged with the Clerk) or in the district court, and so may not be relied on here.

The argument is also quite mistaken for several reasons. Most important, if petitioner's state law claims lack merit, that does not give respondent the right to remove them to federal court. It is true that, in the cases cited by respondent, particular employment-related IIED claims were held by federal courts to be insufficient under Texas law. But in other cases, both Texas and federal courts have upheld IIED suits based on general employment and employment-discrimination claims. *E.g., Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 307 (5th Cir. 1989); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994 (W.D. Tex. 1990); *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App. — Austin 1989), *writ denied in part, rev'd in part on other grounds*, 803 S.W.2d 711 (Tex. 1991). Even the authority cited by respondent acknowledges that such a claim may be available in such cases, if the facts are strong enough. *See MacArthur v. University of Texas Health Center*, 45 F.3d 890, 898-899 (5th Cir. 1995) (citing *Bushell*, *Dean*, and *Wilson*). *See also Wornick Co. v. Casas*, 856 S.W.2d 732 (Tex. 1993).

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[2](...continued)
courts might exercise their discretion to remand the remaining state claim to state court. Therefore, this issue cannot be avoided even if the holding on the emotional distress claim is affirmed.

On the merits of the preemption issue, respondent points to a handful of decisions from other courts stating that particular IIED claims could not be resolved without looking at the provisions of the CBA to decide whether its actions were sufficiently outrageous. And some circuits do say that, in some cases; the law review article cited by respondent, Opp. 14, similarly urges that IIED claims arising out of the employment relationship should automatically be preempted. But as the petition showed, at 17-18, a number of other courts have been willing to uphold IIED claims against preemption because they determined that the facts alleged were so extreme that no construction of the CBA could aid the employer in its defense of the case.

Here, the employer relies on a CBA provision that does no more than place respondent on the same footing vis-a-vis petitioner as a nonunion employer would be against an at-will employee — that is, the CBA expressly refrains from regulating the employer's promotion and assignment of head journeymen. No construction of this provision would aid the defense of an IIED case, assuming, of course, that the state courts and a state jury find the facts compelling enough to make out a case of IIED in the first place. It is precisely the failure of the court below to consider the specific provisions of the CBA at issue, on the theory that the mere existence of a CBA that addressed questions of promotions and assignments was enough to warrant preemption, that puts it at odds with other lower courts and warrants this Court's review of the preemption of the common law tort of IIED, as well as the statutory component of petitioner's race discrimination claim. And, of course, if the Court agrees with petitioner on the removal issue, the preemption claims will be decided in the first instance by the Texas, not federal, courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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